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RECORD, CASE No. 14,922.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1448.

THE COOSAW MINING COMPANY, APPELLANT,

vs.

THE STATE OF SOUTH CAROLINA *EX RELATIONE* B. R. TILLMAN, GOVERNOR; Y. J. POPE, ATTORNEY GENERAL; W. H. ELLERBE, COMPTROLLER GENERAL; GEORGE H. WALTER, AND J. D. MONTGOMERY, CONSTITUTING THE BOARD OF PHOSPHATE COMMISSIONERS OF THE STATE OF SOUTH CAROLINA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED NOVEMBER 2, 1891.

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1 THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

At a circuit court of the United States for the fourth circuit in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1891, before the judges of the said United States circuit court for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such cases made and provided, the following proceedings were had:

THE STATE OF SOUTH CAROLINA *ex Relatione* B. R. TILLMAN, Governor; Y. J. Pope, Attorney General; W. H. Ellerbe, Comptroller General; George H. Walter, and J. D. Montgomery, Constituting the Board of Phosphate Commissioners, Complainants,
against
THE COOSAW MINING COMPANY, Defendants.

2 Be it remembered that heretofore, to wit, on the first day of April, 1891, the said The State of South Carolina *ex relatione* B. R. Tillman, governor; Y. J. Pope, attorney general; W. H. Ellerbe, comptroller general; George H. Walter, and J. D. Montgomery, constituting the board of phosphate commissioners, complainants, impleaded the said The Coosaw Mining Company, defendants, in a bill of complaint, relief, &c.; which bill is in the words and tenor following:

3 UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

Removed from the court of common pleas, county of Beaufort, State of South Carolina.

THE STATE OF SOUTH CAROLINA *ex Relatione* B. R. TILLMAN, Governor; Y. J. Pope, Attorney General; W. H. Ellerbe, Comptroller General; Geo. H. Walter, and J. D. Montgomery, Constituting the Board of Phosphate Commissioners, Plaintiffs,
against
THE COOSAW MINING COMPANY, Defendants.

I.

Certified copy of the record in said suit in the said court of common pleas, to wit, (1) summons, (2) complaint, (3) order of Judge Aldrich to show cause, &c., of 21st March, 1891, (4) petition for removal, and (5) bond for removal (which said certified copy was entered by the defendants in the said U. S. circuit court and filed in the office of the clerk on the 1st day of April, A. D. 1891), as follows:

(1.) *Summons for Relief (Complaint Served).*

To the defendants, The Coosaw Mining Company:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, at the state-house in Columbia, S. C., within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Y. J. POPE,
Attorney General, Plaintiff's Attorney.

Dated March 20th, 1891.
Columbia, S. C.
S. J. BAMPFIELD, *C. C. P.*

[SEAL OF COURT.]

(Served and filed 23d March, 1891.)

4 (2.) *Complaint.*

The State of South Carolina now comes and complains of the above-named defendants and alleges—

1. That the State of South Carolina is the sole owner of the beds of the navigable streams and waters of the said State and of all the phosphate rock and phosphatic deposits therein, and that the Coosaw river, in Beaufort county, in said State, is a navigable stream, and that the bed of the same and so much thereof as lies opposite to and south of Chisolm's island is the absolute property of the said State and is situated in the county of Beaufort aforesaid.

2. That the defendant, The Coosaw Mining Company, claims to be an unincorporated joint stock association, and claims further that it has duly recorded its articles of association, as required by the provisions of an act entitled "An act to protect the rights of creditors of joint stock companies and to regulate the same," approved 23rd Dec., 1879; and plaintiff charges that said defendant is either such unincorporated joint stock association, with its articles of association duly recorded, and as such capable of being sued by the name of its association aforesaid, or is a body corporate, under the laws of the State of South Carolina, under the name of the Coosaw Mining Company.

3. That the said Coosaw Mining Company, by and under a certain license claimed by said company to have been hitherto granted to it by the State of South Carolina, has for some time past been engaged in digging, mining, and removing phosphate rock and phosphatic deposits from the bed of so much of the Coosaw river aforesaid as lies opposite to and south of Chisolm's island; that said Coosaw Mining Company now claims that it has a perpetual grant to all the phosphate rock and phosphatic deposits in the bed of the

aforesaid Coosaw river, and the exclusive right to dig, mine, and remove the same in perpetuity; whereas plaintiff charges that said Coosaw Mining Company has no right, title, interest, or claim
5 whatsoever to the said phosphate rock and phosphatic deposits, nor to dig, mine, or remove the same from the bed of the said Coosaw river; that the same is the absolute property of the plaintiff.

4. That notwithstanding the same the said Coosaw Mining Company, under and by its said pretended claims, continues to assert its right to dig, mine, and remove the said phosphate rock and phosphatic deposits from the bed of the said Coosaw river, and has interfered with, obstructed, and hindered, molested, and prevented and attempted to interfere with, obstruct, hinder, molest, and prevent and continues to interfere with, obstruct, hinder, molest, and prevent and attempt to interfere with, obstruct, hinder, molest, and prevent the above-named B. R. Tillman, governor; Y. J. Pope, attorney general; W. H. Ellerbe, comptroller general; Geo. H. Walter, and J. D. Montgomery, constituting the duly appointed and qualified board of phosphate commissioners of the State of South Carolina, and all persons agents of the plaintiff or thereunto authorized by the plaintiff and the said board of phosphate commissioners, from occupying or possessing the said Coosaw river and from digging, mining, and removing phosphate rock and phosphatic deposits therefrom; that, with the intention and in pursuance of such interference, obstruction, hindrance, prevention, and molestation and attempt to interfere with, obstruct, hinder, prevent and molest, the said Coosaw Mining Company has served notices upon persons and parties by the plaintiff and the said board of phosphate commissioners authorized to dig, mine, and remove phosphate rock and phosphatic deposits from the bed of the aforesaid Coosaw river, and has threatened them with suits for damages for trespassing on the same, and has begun suits and proceedings to enjoin and prevent such persons thereto lawfully authorized by the plaintiff and the said board of phosphate commissioners from digging, mining, and removing the aforesaid phosphate rock and phosphatic deposits from the same, and from occupying and possessing the aforesaid bed of the Coosaw river in pursuance of the authority of the State as aforesaid.

5. That the said bed of the Coosaw river contains a very
6 valuable bed or stratum of phosphate rock and phosphatic deposits, and that it is of the greatest importance to the State that the same be mined without obstruction; that the aforesaid Coosaw Mining Company threatens and is about, by and under color of said unlawful and pretended claim, to dig, mine, and remove the aforesaid valuable phosphate rock and phosphatic deposits from the bed of the Coosaw river as aforesaid and will do so unless restrained by the order of this honorable court, to the irreparable and irremediable injury of plaintiff, by the severance and removal from the territory and jurisdiction of the State of its substance and material of its soil and property.

6. That the income and revenue of the State depends largely

upon the mining and utilization of its phosphate deposits aforesaid, which mining and utilization is conducted by parties who mine therein as the agents of the State, but who fear and are deterred from continuing to mine therein in the face of the proceedings and suits for damages threatened by the aforesaid Coosaw Mining Company.

7. That it is absolutely necessary that the question of the claim of the said Coosaw Mining Company be disposed of and the title of the plaintiff be quieted and established to the aforesaid phosphate rock aud phosphatic deposits in the bed of the Coosaw river, and persons mining therein under authority of the plaintiff or the said board of phosphate commissioners may not be interfered with or molested or deterred or hindered by threats or fear of suits or claims for damages on the part of the defendant; and this plaintiff charges that the claim of the said Coosaw Mining Company to any claim, grant, right, title, interest, or estate in and to the phosphate rocks and phosphatic deposits in the bed of the said Coosaw river or to any right to dig, mine, or remove the same is unlawful and without warrant or grant or authority, and pretensive merely, and is based upon a certain act of the General Assembly, approved 28th March, 1876, entitled "An act to settle definitely the periods at which returns shall be made of phosphate rock and phosphatic
7 deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina and the royalty — shall be paid thereon, and also to fix the terms on which this act may be accepted by the parties named therein;" whereas plaintiff charges that the said act is invalid under the provisions of article II, section 20, of the constitution of the State of South Carolina, and charges further that the said act doth not grant any exclusive, perpetual rights to dig, mine, and remove the said phosphate rock and phosphatic deposits as claimed by said defendant, and charges further that the said defendant hath not duly and punctually performed the conditions upon which said pretended grant as claimed by them was by them claimed to have been granted by the State, in that the said defendant hath not made true and faithful returns of the number of tons of phosphate rock and phosphatic deposits they have dug, mined, and removed and shipped or otherwise sent to market at the end of every month since the 28th March, 1876.

8. That it is absolutely necessary for the quiet and peaceful possession of the aforesaid Coosaw river territory by the plaintiff or the said board of phosphate commissioners and the quiet and practicable digging, mining, and removing of the phosphate rock and phosphatic deposits from the bed thereof by any agents or persons thereto authorized by the plaintiff or the said board of phosphate commissioners that the cloud upon the title of the plaintiff as claimed and set up by the aforesaid Coosaw Mining Company under the said act be removed and quieted and determined.

9. That the said phospate rock and phosphatic deposits being of variable market value and its value depending upon the supply from other places, which is at all times affected and likely to be affected by the discovery of other deposits elsewhere in the world, it

is of the greatest importance to the State that the same be mined and removed and sold as soon as possible.

10. That the said defendant threatens and is about to bring and has brought successive and repeated several suits and proceedings against the several parties digging, mining, and removing
8 (or seeking so to do) phosphate rock and phosphatic deposits from the bed of the said Coosaw river, thereto authorized by the plaintiff or the said board of phosphate commissioners, and will harass and vex the same and reiterate the same question under a multiplicity of proceedings unless enjoined therefrom by this honorable court and their pretended claim determined in this single cause.

Wherefore plaintiff prays—

1. That the defendant, The Coosaw Mining Company, and all persons claiming under them and their servants, agents, officers, and employés be perpetually enjoined and restrained from in any way claiming or attempting to claim any right, title, interest, estate, or grant in or to the phosphate rock and phosphatic deposits in the bed of the Coosaw river as aforesaid, and from digging, mining, or removing and attempting to dig, mine, and remove the same or any part thereof, and from interfering with, obstructing, hindering, or preventing or attempting to interfere with, obstruct, hinder, or prevent any agent of the plaintiff or person thereto by the plaintiff or said board of phosphate commissioners authorized from digging, mining, and removing the same.

2. That in the meantime and until the hearing of this cause a temporary injunction do issue restraining the said Coosaw Mining Company, as hereinbefore prayed.

3. That said defendant and all persons claiming under them be further perpetually enjoined from bringing actions, suits, or proceedings at law or in equity against any persons or parties whomsoever digging, mining, or removing phosphate rock and phosphatic deposits from the bed of the said Coosaw river and thereto authorized by the plaintiff or the said board of phosphate commissioners.

4. That a fit and proper person be appointed as receiver to take possession of the bed of the said Coosaw river, with the usual powers of receivers in such cases pending the final determination of these proceedings.

5. For such other relief as may be just.

Y. J. POPE,
Attorney General, Plaintiffs' Attorney.

9 STATE OF SOUTH CAROLINA, }
County of Aiken. }

Personally appeared the Hon. Y. J. Pope, attorney general for the State of South Carolina and one of the board of phosphate commissioners of the said State, and made oath that the foregoing complaint is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Y. J. POPE,
Attorney General.

Sworn to before me this 21st day of March, 1891.

WALTER ASHLEY,

[L. S.] *Notary Public, S. C.*

(Served and filed 23d March, 1891.)

(3.) *Order to Show Cause Why Defendant Should Not be Enjoined, &c.*

On hearing the complaint herein, and on motion of the Honorable Y. J. Pope, attorney general of the State of South Carolina, it is ordered—

1. That the defendants, The Coosaw Mining Company, show cause, if any they can, before me, at Aiken, South Carolina, at chambers, on Tuesday, 7th April, 1891, at 12 midday, why they and all persons claiming under them and their servants, agents, officers, and employees should not be enjoined and restrained until the hearing of this cause from in any way digging, mining, or removing the phosphate rock and phosphatic deposits in the bed of the Coosaw river and every part thereof, and from attempting to dig, mine, or remove the same or any part thereof, and from interfering with, obstructing, hindering, or preventing or attempting to interfere with, hinder, obstruct, or prevent any agent of the plaintiff or person thereto by the plaintiff or said board of phosphate commissioners authorized from digging, mining, and removing the same, and why a fit and proper person should not be appointed as receiver to take possession of the bed of the Coosaw river, opposite to and south of Chisolm's island, with the usual power of receivers in such cases, pending the final determination of these proceedings.

2. That in the mean time and until the hearing hereby ordered the said defendants, The Coosaw Mining Company, and their servants, agents, officers, and employees, be, and they are hereby, enjoined and restrained from in any way digging, mining, or removing the phosphate rock and phosphatic deposits in the bed of the Coosaw river as aforesaid, and from digging, mining, or removing and attempting to dig, mine, or remove the same or any part thereof, and from interfering with, obstructing, hindering, or preventing or attempting to interfere with, obstruct, hinder, or prevent any agent of the plaintiff or person thereto by the plaintiff or the said board of phosphate commissioners authorized from digging, mining, and removing the same.

3. It is further ordered that U. R. Brooks be, and he is hereby, appointed temporary receiver of all the Coosaw river phosphate territory lying opposite to and south of Chisolm's island, with the usual powers of receivers in such cases, to take possession of, hold, and occupy the same subject to the order of this court, and that he make a report to this court of all his actions and doings thereunder.

4. It is ordered further that a copy of this order be forthwith

served upon the president or chief manager or other principal officer of said Coosaw Mining Company.

JAMES ALDRICH,
Judge 2d Circuit.

March 21st, 1891.
At chambers, Aiken, S. C.
(Served and filed 23d March, 1891.)

11 (4.) *Petition for Removal to the U. S. Court.*

To the honorable the court of common pleas for the county of Beaufort aforesaid:

The petition of the Coosaw Mining Company, a joint stock company or mining partnership, the defendants in the above-entitled action, respectfully shows:

1. That on or about the 23d day of March, 1891, the above-entitled action was commenced in this honorable court by service of the summons and complaint therein upon Robert Adger, as chief manager, at Charleston, S. C., and also upon Moses E. Lopez, as superintendent of the said company, at Coosaw, South Carolina, and that along with the said summons and complaint there was served upon the said parties an *ex parte* order for a temporary injunction and receiver, &c., made on the said complaint, and on motion of the plaintiff's attorney, by the Honorable James Aldrich, judge of the second circuit, at chambers, in Aiken, South Carolina, on the 21st March, 1891, which will more fully appear by reference thereto, as it is on record in this court.

2. That the said action is a suit of a civil nature, at common law or in equity, in which the matter in dispute exceeds, exclusive of interest and costs, the sum and value of ten thousand dollars, and arises under the Constitution of the United States in manner following—that is to say:

3. That the plaintiff herein, to wit, the State of South Carolina, by a certain act passed by the General Assembly of the said State, entitled "An act to settle definitely the periods at which returns shall be made of phosphate rock and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina and the royalty shall be paid thereon, and also to fix the terms on which this act may be accepted by the parties named therein," approved March 28th, A. D. 1876, did contract with the de-

12 fendants' your petitioners, The Coosaw Mining Company, for the considerations therein named, that upon their acceptance of the terms of the said act within ten days from the date of its approval, and upon their compliance with all the other terms and conditions expressed in the said act, that they, your petitioners, should "thenceforth have the exclusive right to occupy and dig, mine, and remove phosphate rock and phosphatic deposits from all that part of the said Coosaw river" in said act mentioned "so long as and no longer than they shall make true and faithful returns of the number of tons thereof they shall so dig, mine, and remove and ship or otherwise send to market, and punctually pay the royalty

thereon, as provided in the first section of this act," a copy of which said act is hereto annexed as part and parcel of this petition and marked Exhibit A.

4. That at the time of the passage of the said act your petitioners were in the actual occupation of the said part of Coosaw river under an agreement with the said State whereby they had a fixed tenure for the space of about fifteen years continuing thereafter with no provision for forfeiture in case of their failure to make true and faithful returns and punctually pay the royalty on all phosphate rock which they might dig, and under which agreement their returns were only to be made and their royalty only to be paid annually.

5. That your petitioners duly accepted the terms of the said act of 28th March, 1876, within the period limited for such acceptance, and have duly and faithfully complied with every condition of the said act and of their contract with the State, and have duly and faithfully made the returns and paid the royalty as therein prescribed.

6. That thereby and for valuable considerations a contract was duly made and entered into by and between the said State and your petitioners, and that your petitioners have on their part fully and faithfully observed and performed all the conditions of the said act and of the said contract.

7. That in consideration of the said contract and of the
13 claim, grant, right, title, interest, and estate of your petitioners thereunder they, your said petitioners, expended large sums of money in addition to the amounts already invested in their mining plant in said river in the building of additional dredges, washers, and other mining plant, the purchase of additional tugs, and the erection of additional drying sheds and other buildings and plant on shore for the purpose of more largely digging, mining, and removing phosphate rock and phosphatic deposits from the said territory; that the additional amount so invested by them exceeds the sum of two hundred and fifty thousand dollars.

8. That your petitioners have ever since continuously and exclusively occupied the said territory and have been continuously and constantly digging, mining, and removing the phosphate rock and phosphatic deposits therefrom in very large amounts, and have continuously paid under the said contract large sums of money quarterly into the treasury of the said State therefor, aggregating nearly one million and a quarter of dollars.

9. That the said State of South Carolina, disregarding its obligations and the contract so made and entered into by it with your petitioners and impairing the obligation thereof, did, on the 23d day of December, A. D. 1890, pass an act entitled "An act to create a board of phosphate commissioners, defining its purposes and duties," which said board was charged with the exclusive control and protection of the rights and interests of the State in the phosphate rock and phosphatic deposits in the navigable streams and in the marshes thereof, and by which said act it was expressly provided and enacted as follows:

"SECTION 10. That the said board of phosphate commissioners are hereby authorized and directed, after the first day of March, 1891, to take possession and control of the Coosaw river phosphate territory heretofore occupied by the Coosaw Mining Company, and to issue licenses to mine therein and remove phosphate rock and phosphatic deposits therefrom, in like manner as is now provided by law for the other navigable streams and waters of the State: Provided that (such parties so licensed or authorized shall be deemed the agents of the State, and) each ton of phosphate rock or
14 phosphatic deposits, the product of such mining operations, shall be deemed the property of the State until the said parties shall have paid thereon a royalty to be fixed by said commission at not exceeding two dollars per ton on each ton of phosphate rock or phosphatic deposits dug, mined and removed, provided six months' notice shall be given before raising royalty above one dollar."

10. That by other sections of the said act an attempt is made by the said State of South Carolina further to impair the obligation of its said contract by providing that any person or persons who shall mine or attempt to mine any phosphate rock from the said Coosaw river without a license from the board of phosphate commissioners so to do shall be punished for each such attempt by fine and imprisonment, thus annulling and abrogating the contract heretofore made with the said Coosaw Mining Company, and thus attempting to make it a criminal offense on the part of your petitioners, the said company, to exercise their rights under the said contract.

11. That, further to impair the obligation of the said contract, the said State of South Carolina, by the said act of 23d December, 1890, provided that should any person or persons attempt to mine or remove phosphate rock or phosphatic deposits from the said Coosaw river phosphate territory after the said 1st day of March, 1891, by and with any boats, vessels, marine dredges, or other appliances for the same, without the leave or license of the said board of phosphate commissioners thereto first had and obtained, all such boats, vessels, marine dredges, and other appliances were thereby declared forfeited to and the property of the State of South Carolina; and it was made the duty of the attorney general for and on behalf of the State to institute proceedings in any court of competent jurisdiction for the claim and delivery thereof, in which actions the title of the State shall be established by the proof of the commission by the person or persons owning the same or their agents in possession of such boats, vessels, marine dredges, or other appliances of any such act of forfeiture, and the State is expressly released from the
15 necessity of giving bond in such action as is required by the law of the State from every other person instituting proceedings of like nature.

And your petitioners affix to this their petition, as part and parcel thereof, a copy of the said act of 23d December, 1890, as Exhibit B, to which they crave reference as fully and as often as may be necessary.

12. That the relators in this action were created and appointed

the board of phosphate commissioners under and by terms of the said act of December 23d, 1890, and derive their authority and position solely from said act; that under and by the terms of said act the relators so constituting the said board are authorized and directed for and in the name of the State, plaintiff herein, to enter upon and take possession of the said Coosaw river territory theretofore exclusively occupied by your petitioners under their contract with the said State, plaintiff herein, and to issue licenses to other parties to mine therein, and that they derive their authority so to do from no other source than the said act; that in attempting to take possession of the said Coosaw river territory and in issuing licenses to other parties or persons to mine therein as agents of the said State and doing other acts, as is alleged in the complaint herein, they are acting solely under and by the authority of the said act of December 23d, 1890, and that the institution of this present suit and these proceedings is solely under and in pursuance of the provisions of the said act of December 23d, 1890; all of which said actings and doings are in violation of the said contract of your petitioners with the said State and impair the obligation thereof.

13. That the said act of December 23rd, 1890, impairs the obligation of the contract so entered into by and between the said State of South Carolina and your petitioners, The Coosaw Mining Company, and is in violation of the tenth section of the fourth article of the Constitution of the United States, and that the said act is further repugnant to and in violation of the fifth and fourteenth amendments to the Constitution of the United States, in that it seeks to deprive your petitioners of their property without due
16 process of law and denies to them within the jurisdiction of the State of South Carolina the equal protection of the laws of the State of South Carolina.

14. Your petitioners further allege that the matter in dispute in this action, to wit, the claim, grant, right, title, interest, and estate which they have under their said contract with the said State (the obligation of which contract is impaired by the said act of December 23rd, 1890), is of great value, and largely in excess of the value of ten thousand dollars.

15. That therefore this said action may be removed by your petitioners from this honorable court to the circuit court of the United States for the district of South Carolina, under the acts of Congress in such cases made and provided.

16. That your petitioners have made and herewith filed a bond, with good and sufficient surety, for their entering in the said circuit court of the United States for the district of South Carolina, on the first day of its next session, a copy of the record in said action, and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that said action was wrongfully or improperly removed thereto.

17. That by the aforesaid acts of Congress it is the duty of this honorable court to accept this petition and the said bond and proceed no further in said action.

Wherefore your petitioners pray that this honorable court will ac-

cept this petition and the said bond and proceed no further in the said action, and that the said action or suit stand removed into the circuit court of the United States in and for the said district of South Carolina, pursuant to the said acts of Congress, and that no further proceedings may be had therein in this court.

And your petitioners will ever pray, &c.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Counsel for Petitioners, The Coosaw Mining Company.
THE COOSAW MINING COMPANY,
By ROB'T ADGER, *Chief Manager.*

17 STATE OF SOUTH CAROLINA, }
County of Charleston. }

Before me, D. B. Henderson, a notary public of the State of South Carolina in and for the county of Charleston, personally appeared Robert Adger, who, being duly sworn, says that he is a member of the joint stock company or mining partnership known as the Coosaw Mining Company, the petitioners in this action; that he is the chief manager of that company and has been its chief manager since its organization, and is thoroughly acquainted with all of its business and affairs.

That the foregoing petition is true of his own knowledge.

ROB'T ADGER.

Sworn to and subscribed before me this 30th day of March, A. D. 1891.

[L. S.] D. B. HENDERSON,
Notary Public.

EXHIBIT "A."

An act to settle definitely the period at which returns shall be made of phosphate rock and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina and the royalty shall be paid thereon, and also to fix the terms on which this act may be accepted by the parties named therein.

Whereas differences have arisen between the Coosaw Mining Company and the comptroller general as to the times and manner in which the said company shall make their returns of the number of tons of phosphate rocks and phosphatic deposits dug, mined and removed by them from the beds of the navigable streams and waters of the State, and also as to the times when the royalty thereon shall be paid; therefore, for remedy thereof—

SEC. 1. Be it enacted by the senate and house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, that the said
18 Coosaw Mining Company, and all other companies and persons engaged in digging, mining and removing phosphate rock and phosphatic deposits from the bed of the navigable streams

and waters of the State, shall be, and they are hereby, required, from and after the passage of this act, to make to the comptroller general true and faithful returns of the number of tons of phosphate rocks and phosphatic deposits they have so dug, mined and removed and shipped, or otherwise sent to market, at the end of every month; and shall punctually pay to the State treasurer the royalty already provided by law to be paid thereon at the end of every quarter or three months, the first quarter to commence to run on the first day of March in the present year.

SEC. 2. That the said Coosaw Mining Company, and all other companies and persons mentioned in the preceding section, shall, within ten days from the passage of this act, enter into new bonds, in the penal sums and in the manner and form already provided by law, but conforming, in their conditions, to the terms set forth in the said preceding section, and also pay to the State treasurer the royalty accrued up to the said first day of March of the present year.

And whereas it is desirable that the said Coosaw Mining Company, and all other companies and persons engaged in digging, mining and removing phosphate rock and phosphatic deposits as aforesaid, shall accept the terms of this act, in order to make it binding on them respectively; and whereas the said Coosaw Mining Company have already occupied so much of the Coosaw river as lies opposite to and south of Chisolm's island, whereon their works are located, and to the marshes thereof, and have expended large sums of money in establishing themselves thereon with sufficient mining plant for mining and preparing for market the phosphate rocks and phosphatic deposits of that part of the said Coosaw river; therefore, in consideration thereof,

SEC. 3. That the said Coosaw Mining Company, on accepting the terms of this act within ten days from the passage thereof, shall thenceforth have the exclusive right to occupy and dig, mine
19 and remove phosphate rock and phosphatic deposits from all that part of the said Coosaw river above mentioned so long as and no longer than they shall make true and faithful returns of the number of tons thereof they shall so dig, mine and remove and ship or otherwise send to market, and punctually pay the royalty thereon, as provided in the first section of this act.

SEC. 4. That all other companies and persons engaged in digging, mining and removing phosphate rocks and phosphatic deposits as aforesaid under gift and grant of the State of South Carolina or by authority thereof, who shall accept the terms of this act within ten days from the passage thereof, shall thenceforth have the same exclusive right where they have respectively occupied and established themselves for mining purposes, and on the same limitations as are prescribed in the preceeding section of this act.

SEC. 5. That all acts and parts of acts inconsistent with this act be, and they are hereby, for the purposes of this act, repealed.

Approved March 28th, 1876.

EXHIBIT "B."

An act to create a board of phosphate commissioners, defining its purposes and duties.

SEC. 1. Be it enacted by the senate and house of representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That a board of phosphate commissioners be, and is hereby created and established, which shall be constituted as follows: The governor, the attorney general, the comptroller general, and two persons, citizens of the State, the last two to be appointed by the governor, attorney general and comptroller general of this State, for the term of six years; the first appointment, however, to be made, one for four years, and one for six years. The governor, attorney general and comptroller general shall not receive any compensation for their services on this board, except actual traveling and other necessary expenses while engaged in attending to the duties as members of this board when the same shall be performed at any other place than the State capital. The two commissioners appointed as above shall receive as compensation for their services the same per diem and mileage as members of the General Assembly for the time they are actually engaged in performing the duties of their office.

SEC. 2. That the said board shall be charged with the exclusive control and protection of the rights and interests of the State in the phosphate rock and phosphatic deposits in the navigable streams and in the marshes thereof, except that the comptroller general shall continue to receive the reports of rock mined and dug and the royalty paid into the State treasury.

SEC. 3. That all the powers, duties, rights and privileges vested in, and exercised by, the Department of Agriculture, as now established by law, so far as the same pertains and relates to the management and protection of the rights and interests of this State in the phosphate rock and phosphatic deposits in the navigable streams of this State and in the marshes thereof, be, and the same are hereby, vested in, and are devolved upon, the board of phosphate commissioners herein created and established.

SEC. 4. That the said board are hereby empowered and directed, if they see proper, as soon as practicable, to begin a survey of the State phosphate territory, and for this purpose they may employ such experts and other persons, and may obtain, by purchase or otherwise, such a dredge or other apparatus as shall be found necessary to prosecute this work in a thorough manner, and the sum of ten thousand dollars is hereby appropriated to defray the expenses thereof.

SEC. 5. That the said board shall appoint a phosphate inspector, whose salary shall be at the rate of fifteen hundred dollars per annum, payable monthly, and whose power and duties shall be prescribed by the said board.

21 SEC. 6. That the said board shall also be empowered, if, upon full investigation and examination, they deem it advisable, to require all persons or corporations digging or mining phosphate rock or phosphatic deposits in the navigable streams of this State, and in the marshes thereof, to pay the State a royalty not to exceed two dollars per ton for all or any phosphate rock so dug or mined, provided six months' notice shall be given before raising royalty above one dollar.

SEC. 7. That the governor shall be chairman of the board, and three members of this board shall constitute a quorum for the transaction of any business pertaining to the said board, and the secretary shall be appointed from among the members of the said board.

SEC. 8. That the said board shall report annually to the General Assembly their actings and doings during the year, and to the time of the meeting of the same with an itemized account of all their expenses for said year.

SEC. 9. That immediately after the approval of this act it shall be the duty of the Department of Agriculture to transfer and deliver to the board of phosphate commissioners herein created and established all books, papers, leases, records, or other things pertaining to the phosphate interests of this State.

SEC. 10. That the said board of phosphate commissioners are hereby authorized and directed after the first day of March, 1891, to take possession and control of the Coosaw river phosphate territory heretofore occupied by the Coosaw Mining Company, and to issue licenses to mine therein, and remove phosphate rock and phosphatic deposits therefrom, in like manner as is now provided by law for the other navigable streams and waters of the State; Provided, that (such parties so licensed or authorized, shall be deemed the agents of the State, and) each ton of phosphate rock or phosphatic
22 deposits, the product of such mining operations, shall be deemed the property of the State until the said parties shall have paid thereon a royalty, to be fixed by said commission, at not exceeding two dollars per ton on each ton of phosphate rock or phosphatic deposits dug, mined and removed, provided six months' notice shall be given before raising the royalty above one dollar.

SEC. 11. Should any person whomsoever interfere with, obstruct, or molest, or attempt to interfere with, obstruct, or molest the said board of phosphate commissioners, or any one of them authorized or licensed hereunder, in the peaceable possession and occupation for mining purposes of any of the marshes and navigable streams and waters of the State, then, and in that case, the said board of phosphate commissioners are hereby authorized, in the name and on behalf of the State of South Carolina, to take such measures or proceedings as they may be advised are proper to enjoin and terminate any such molestation, interference or obstruction, and place the State, through its agents, the said board of phosphate commissioners, or any one under them authorized, in absolute and practicable possession and occupation of the same.

SEC. 12. Any person or persons wilfully interfering with, molesting, or obstructing, or attempting to interfere with, molest, or ob-

struct, the State or the said board of phosphate commissioners, or any one by them authorized or licensed, in the peaceable possession and occupation of any of the said marshes and navigable streams and waters of the State, including the said Coosaw river phosphate territory, or who shall dig or mine, or attempt to dig or mine, any of the phosphate rock or phosphatic deposits of this State, without a license so to do by said board of phosphate commissioners, shall be punished for each offense by a fine of not less than one hundred dollars or more than five hundred dollars, or impriso-ment for not less than one or more than twelve months, or both, at the discretion of the court.

SEC. 13. Should any person or persons, corporation or cor-
23 porations, attempt to mine or remove phosphate rock and phosphatic deposits from any of the said marshes and navigable waters and streams, including the aforesaid Coosaw river phosphate territory, after the said first day of March, 1891, by and with any boats, vessels, marine dredges or other appliances for the same, without the leave or license of the said board of phosphate commissioners thereto first had and obtained, all such boats, vessels, marine dredges, and other appliances, are hereby declared forfeited to and the property of the State of South Carolina, and it shall be the duty of the attorney general, for and in behalf of the State, to institute proceedings in any court of competent jurisdiction for the claim and delivery thereof in the ordinary form of action for claim and delivery, in which actions the title of the State shall be established by the proof of the commission by the person or persons, corporation or corporations owning the same, or their agents in possession of such boats, vessels, marine dredges or other appliances, of any such act of forfeiture; Provided, that in any such action the State shall not be called upon or required to give any bond or obligation as is required by parties plaintiff in action for claim and delivery.

SEC. 14. The said board are further authorized and empowered to inquire into and protect the interests of the State in and to any phosphate deposits or mines, whether in the navigable waters of the State or in land marshes or other territory owned or claimed by other parties, and in the proceeds of any such mines, and to take such action for or in behalf of the State in regard thereto as they may find necessary or deem proper.

SEC. 15. That so much of all acts or parts of acts inconsistent with the provisions of this act be, and the same is hereby, repealed.

Approved the 23d day of December, A. D. 1890.

B. R. TILLMAN, *Governor.*

(Filed 30th March, 1891.)

24 (5.) *Bond for Removal to the U. S. Court.*

Know all men by these presents that The Coosaw Mining Company, a joint stock mining partnership, the defendants in the above-entitled action, by Robert Adger, their chief manager, as principals, and Moses E. Lopez, John B. Adger, Jr., and Theodore D. Jervey, as sureties, are held and firmly bound unto The State of South Caro-

lina, the plaintiffs in the above-entitled action, and all other persons whom it may concern in the penal sum of five thousand dollars; for the payment of which, well and truly to be made and done, they, the said Coosaw Mining Company and Moses E. Lopez, John B. Adger, Jr., and Theodore D. Jervey, bind themselves and each and every of their successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with their seals and dated at Charleston, South Carolina, this 30th day of March, in the year of our Lord one thousand eight hundred and ninety-one, and in the one hundred and fifteenth year of the Independence of the United States of America.

Whereas the said The Coosaw Mining Company file herewith in the court of common pleas for the county of Beaufort aforesaid a petition for the removal of the above-entitled action or suit from this court to the circuit court of the United States for the district of South Carolina:

Now, the condition of the above bond or obligation is such that if the above-bound The Coosaw Mining Company shall and do well and truly enter or cause to be entered in the said circuit court of the United States on or before the first day of its next session a copy of the record in the said action, and shall and do well and truly pay or cause to be paid all costs that may be awarded by the said circuit court of the United States if said court shall hold that said
25 action was wrongfully or improperly removed thereto, then this bond or obligation to be void and of none effect; otherwise to be and remain in full force and virtue.

THE COOSAW MINING COMPANY, [SEAL.]
By ROBERT ADGER, *Chief Manager.*
MOSES E. LOPEZ. [SEAL.]
JOHN B. ADGER, JR. [SEAL.]
THEO. D. JERVEY. [SEAL.]

Sealed and delivered in the presence of—
E. D. ROBINSON.

STATE OF SOUTH CAROLINA, } ss:
County of Charleston, }

Personally appeared E. D. Robinson and made oath that he saw the above-named Robert Adger, as chief manager of the Coosaw Mining Company, and Moses E. Lopez, John B. Adger, Jr., and Theodore D. Jervey sign, seal, and deliver the above-written obligation.

E. D. ROBINSON.

Sworn to before me this 30th day of March, A. D. 1891.
[SEAL.] D. S. HENDERSON,
Notary Public.

STATE OF SOUTH CAROLINA, } ss:
County of Charleston, }

Personally appeared Moses E. Lopez, John B. Adger, Jr., and Theodore D. Jervey, sureties to above obligation, and each, being

duly sworn, on oath says that he is severally worth, free of debt and all legal exemptions, the sum set opposite his name below, to wit, the sum of five thousand dollars.

MOSES E. LOPEZ, $5,000.
JOHN B. ADGER, JR., $5,000.
THEODORE D. JERVEY, $5,000.

Sworn to before me this 30th day of March, 1891.
[SEAL.] D. S. HENDERSON,
Notary Public.

26 STATE OF SOUTH CAROLINA, }
Beaufort County. }

I approve the foregoing bond and the sureties thereto as good and sufficient.
[SEAL OF COURT.] S. J. BAMFIELD, *C. C. P.*

March 30th, 1891.

(Filed 30th March, 1891.)

THE STATE OF SOUTH CAROLINA, }
County of Beaufort. }

I, S. J. Bamfield, clerk of the court of common pleas in and for the county and State aforesaid, do hereby certify that the matter of the within — pages is a true and correct copy of the entire record in the within-entitled action or suit in the said court.

Witness my hand and the seal of said court, at Beaufort, S. C., this first day of April, A. D. 1891.
[SEAL OF COURT.] S. J. BAMFIELD, *C. C. P.*

II.

Notice of Removal, &c., and of Motion Before the U. S. Circuit Court to Vacate Temporary Injunction, &c.

To Hon. Y. J. Pope, attorney general of South Carolina, attorney for the plaintiffs herein:

Please take notice that this suit has, by proper proceedings under the acts of Congress in such case made and provided, been removed from the said court of common pleas for Beaufort county into the circuit court of the United States for the district of South Carolina, and that the defendants herein will on Tuesday, the 7th day of April, A. D. 1891, show cause in the said circuit court of the United
27 States for the district of South Carolina, in the court-house, in Charleston, S. C., why an injunction should not be granted against them or a receiver appointed as directed by the order of the 21st of March, A. D. 1891, heretofore made herein.

And that they will, at the same time and place, move to vacate

the temporary injunction, and for such further relief as may be just and proper in the premises.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Defendants' Solicitors.

April 2nd, 1891.

(Served 2nd April, 1891, and filed 3rd April, 1891.)

III.

Order to Docket, &c.

Upon examining the record in this cause as certified by the clerk of the court of common pleas for the county of Beaufort and State of South Carolina, including the petition for removal filed by the defendants and the removal bond made and filed therewith, and the same appearing *prima facie* regular in form and sufficient—

And counsel for the defendants appearing with their written return to the order to show cause heretofore issued in this cause by order dated 21st March, A. D. 1891—

Ordered that the said suit and cause be docketed upon the motion docket of this court; that the return of the defendants be filed, and that the hearing thereon be continued and fixed for to-morrow, the 8th inst., at 11 o'clock a. m.; this order to be without prejudice to a motion to remand for any reason.

CHARLES H. SIMONTON,
U. S. Judge.

7th April, 1891.

(Filed 7th April, 1891.)

28 IV.

Return of the Defendants to the Order to Show Cause, &c., of 21st March, 1891.

And now come The Coosaw Mining Company, a joint stock company and mining partnership, defendants herein, and for return to the order to show cause heretofore made in this cause respectfully show to this honorable court:

First. That by the said order these defendants are required to show cause, on Tuesday, the 7th day of April, A. D. 1891, at 12 o'clock m., why they should not be enjoined from in any way digging, mining, or removing the phosphate rock and phosphatic deposits in the territory to which they are entitled in Coosaw river and why a receiver should not be appointed to take possession of the said territory.

That in the meantime the said Coosaw Mining Company have been by the same order restrained from such mining operations and one U. R. Brooks has been appointed temporary receiver of the said territory.

Second. And these defendants show to the court that no bond of

any sort has been given by or on behalf of the plaintiffs as a condition towards obtaining the said injunction, and that the said Coosaw Mining Company are entirely without any redress for the damage caused to them thereby; that, as these defendants are informed and verily believe, the plaintiff claims if the said temporary injunction should be continued that under some provision of the Code of Procedure enacted by the said State of South Carolina, plaintiff herein, no injunction bond will be required; that the temporary injunction already granted has caused damage, and its continuance as asked for in the plaintiff's complaint herein will work irreparable harm and damage to the defendants, for which harm and damage they will be utterly remediless, inasmuch as the plaintiff herein, The State of South Carolina, cannot be sued, even if proceedings by suit were proper and could otherwise be maintained, for damages caused by such injunction; therefore a continuance of the said injunction under these circumstances will, as a matter of fact, cause irreparable damage to the defendants, as is hereinafter more fully set out,
29 without providing in any way to the defendants any measure of relief or indemnity should they be ultimately successful in this action.

Third. That the Coosaw Mining Company were organized and exist solely for the purpose of mining, removing, and shipping phosphate rock from the beds of the navigable streams and waters of this State; that they are the owners of a very large and valuable plant, located partly on land and partly afloat, consisting of dredges, wash-boats, lighters, flats, tugs, and other plant afloat necessary to mine and remove, crush and wash, and deliver the said rock, and also large and extensive drying sheds, machine shops, marine railways, and other buildings, ship yards, and other expensive plant ashore, for the purpose of manipulating and preparing for market the said rock so mined and removed and crushed and washed.

That an injunction stopping their work will cause them irreparable damage, in that by any prolonged suspension the machinery and plant of the said company will rapidly deteriorate and diminish in value and become in a short time worthless, while their large outlay and investment in such mining plant will be utterly unremunerative and idle.

Fourth. That the Coosaw Mining Company have for the past twenty-one years been actively engaged in selling the phosphate rock so mined and prepared by them, and have built up a very large and valuable trade, and have secured a very large number of desirable customers, who have for years purchased their supplies of phosphate rock exclusively from these defendants; that this business so established is of great value to these defendants, and if they are enjoined, as prayed for in the complaint herein, from carrying on their mining operations as they have been conducting them for years this business will be dissipated, and, in the face of competition from other and newly discovered and opened phosphate deposits in this State and elsewhere, can never be regained; that this will cause irreparable and irremediable injury and damage to the defendants.

Fifth. That the defendants have, in the ordinary and orderly

course of their said business, entered into contracts with various customers for the sale and delivery to them from time to
30 time in the future of large quantities of phosphate rock; that these contracts were entered into in good faith and are now pending, and if the defendants are enjoined from continuing their mining operations as prayed for in the complaint heavy and serious loss and damage will be caused to them.

Sixth. And these defendants further show that they, the said Coosaw Mining Company, have been mining in the said Coosaw river since the year 1870; that they have dug and removed therefrom over one million three hundred thousand tons of phosphate rock; that the territory, if mined according to the system and under the exclusive control of their superintendent and in the skillful method which they have followed, will continue to yield for a limited time to come a sufficient output to justify them in continuing their operations and enable them to continue their average payments of royalty to the said State; that the plaintiff herein has sought to oust the defendants and to grant licenses to sundry other parties to enter the said territory, which is claimed by these defendants under what is known as the general rights system, which allows the parties mining to dig without the systematic supervision and control and without the method exercised by the defendants, The Coosaw Mining Company, working under exclusive rights; that if such proceedings are allowed in the territory which is claimed by these defendants the result in a short time will be to absolutely ruin the said territory and render it of no value, and the loss to the defendants herein caused thereby will be irreparable and irremediable.

Seventh. And these defendants further show that it is not to the interest of the State of South Carolina that the injunction prayed for should be granted or that the present restraining order should be continued; that the plaintiff in her said bill of complaint alleges that her income and revenue depend largely upon the mining and utilization of her phosphate deposits, and that it is absolutely necessary and of the greatest importance to the State, in view of other phosphate deposits which may be discovered, that the same be mined and removed without delay; that the Coosaw Mining Company have for twenty-one years been mining in the said waters
31 and duly paying royalty to the State without any complaint or objection whatsoever on the part of the State, the plaintiff herein, or any of her officers or agents since the passage of the act of 28th March, 1876, either as to the method in which such operations have been conducted or as to the correctness of the returns made or the royalty paid or for any other cause or reason.

And these defendants further submit to the court that the relators, the said board of phosphate commissioners, have in an official communication addressed to the chief manager of the defendants, the said Coosaw Mining Company, bearing date March 19th, 1891, stated as follows: "Our observation of the mining around Beaufort has led us to believe that exclusive rights are not detrimental to the State's interest, and that it will be best for the State and for the miners were all the mining done by one company." And these de-

fendants deny, therefore, the allegations in the said complaint, to wit, that irreparable and irremediable damage will ensue to the plaintiff unless the defendants be enjoined from working, and insist, on the contrary, that great damage and loss will ensue to the plaintiff and irreparable loss and damage to the defendants should the defendants be enjoined, especially if other parties are in the meantime allowed to mine under the system of general rights in the exclusive territory of these defendants.

Eighth. And these defendants further submit and allege, as set out in the pleadings and record herein, that the Coosaw Mining Company claim to have "the exclusive right to occupy and dig, mine, and remove phosphate rock and phosphatic deposits from the said Coosaw river," &c., for an indefinite period; that this right they have never waived in any way or manner; that if pending the litigation others are allowed to work in the said territory irreparable damage will be done to the said Coosaw Mining Company, for which no adequate relief can be afforded even were an injunction bond given in the case.

Ninth. And these defendants further show to this honorable court that the parties licensed by the relators herein under the provisions of the said act of December 23d, 1890, to enter upon and mine
32 the phosphate rock from the territory of these defendants in Coosaw river are the Carolina Mining Company, the Farmers' Mining Company, and the Beaufort Phosphate Company, all corporations of the said State of South Carolina; that of these the Carolina Mining Company and the Farmers' Mining Company, by the order of the United States circuit court for the district of South Carolina in causes now pending therein (in which causes these defendants are plaintiffs and the said companies, together with the relators, B. R. Tillman, Y. J. Pope, W. H. Ellerbe, J. D. Montgomery, and George H. Walter, are defendants), have been enjoined and restrained from entering into the said territory in Coosaw river belonging to these defendants or from mining therein or from in any way interfering with the continued mining operations of these defendants therein.

All of which will more fully appear by the records of the said causes on file in the said United States circuit court, a copy of said order of injunction being herewith filed as part and parcel of this return and marked "Exhibit A."

Tenth. And these defendants further show to this honorable court that the said Carolina Mining Company, the Farmers' Mining Company, and the Beaufort Phosphate Company, being the parties referred to in the complaint herein as having been licensed by the relators to mine in the territory of these defendants in the said Coosaw river, have been each and all of them actively engaged since their organization in mining phosphate rock in other territory belonging to the said State and paying to her royalty thereon; that if the said parties had been permitted under their licenses, issued under the provisions of the said act of December 23d, 1890, to mine in the territory of these defendants in Coosaw river that the effect would have been merely to transfer their mining operations from

one part of the State's territory to another; that they have put in no new plant, and that no new parties not now engaged in mining in the State's territory have applied for or obtained licenses from the said board to mine therein; that the said parties, to wit, the Carolina Mining Company, the Farmers' Mining Company,
33 and the Beaufort Phosphate Company, are now engaged in mining under licenses from the said State in territory of the said State other than that in Coosaw river belonging to these defendants, and are actively engaged in digging and removing the phosphate rock therefrom and are paying to the State the royalty on the rock so dug, removed, and sent to market.

Eleventh. And these defendants further submit to this honorable court that all the facts stated herein show that no damage will be caused to the plaintiff by refusing the continuance of the injunction as prayed for, while, on the contrary, irreparable and irremediable damage will be caused to these defendants if it should be granted, and they therefore submit that this honorable court should not in the exercise of its discretion grant such injunction or continue said receiver; but they further submit that if the plaintiff, The State of South Carolina, is entitled to any relief in the premises, which they do not admit, that the full measure of the relief would be the requiring of a bond from these defendants to make true and faithful returns to the said State and to this honorable court of the number of tons which they may dig, mine, and remove and ship or otherwise send to market from the said territory and to pay the royalty of one dollar per ton thereon, as provided by law.

Twelfth. And these defendants hereto annex as part and parcel hereof the affidavit of their superintendent, Mr. Moses E. Lopez, which they pray may be taken and held as embodied in and forming part of this return.

Thirteenth. That in appointing the said receiver no bond has been required of him for the faithful discharge of his duties as such, and these defendants are totally without protection against any wrong-doing on his part as such receiver, and that U. R. Brooks, appointed temporary receiver, is a paid clerk and employee of the plaintiff in the office of the secretary of state.

Fourteenth. For all of which reasons these defendants submit that no order of injunction or receivership ought to be continued or granted in this cause.

McCRADY SONS & BACOT,
SMYTHE & LEE,
Defendants' Solicitors.

34 THE STATE OF SOUTH CAROLINA, }
County of Charleston. }

Before me, David B. Henderson, a notary public in and for the said State, personally appeared Robert Adger, who, being first duly sworn, deposeth and saith:

That he is a member and the chief manager of the joint stock company or mining partnership known as the Coosaw Mining Company, defendants in this action.

That he has been the chief manager of the said company continuously from its organization in 1870 down to the present time.

That he has carefully read the allegations contained in the foregoing return of the said Coosaw Mining Company, and that all of the said allegations are true to his own knowledge.

ROBERT ADGER.

Sworn to before me this 6th day of April, 1891.

D. B. HENDERSON,
[L. S.] *Notary Public.*

EXHIBIT "A."

Order for Injunction.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

THE COOSAW MINING COMPANY, Complainants,
vs.
THE CAROLINA MINING COMPANY *et al.*, Defendants.

On reading and filing the sworn bill in this cause and the affidavit of Robert Adger and Moses E. Lopez, and on motion of McCrady, Sons & Bacot and Smythe & Lee, solicitors for the complainants—

It is ordered that the defendants, Benjamin R. Tillman, Y. J. Pope, W. H. Ellerbee, J. D. Montgomery, George H. Walter, and A. W. Jones, be, and they are and each of them is hereby,
35 commanded and enjoined from entering upon or in any manner interfering with that part of the Coosaw river which has been heretofore occupied by the said Coosaw Mining Company under grant of the act of the General Assembly of 1876 of the State of South Carolina, and more fully described in the complainants' bill, or any portion thereof, or from in any way or manner interfering with or interrupting the occupancy and quiet enjoyment of the said Coosaw Mining Company thereof or with the continuance by them of their mining operations therein, or from authorizing or assuming to authorize others to enter upon the said territory, or to dig, mine, or remove phosphate rock and phosphatic deposits therefrom or from any portion thereof, and from instigating and encouraging others so to do.

And that the defendant The Carolina Mining Company and each of its agents, servants, and workmen, and each and every person claiming to act under their or either of their authority, control, or direction, be, and they are hereby, commanded and enjoined to refrain from entering upon the said part of Coosaw river or any portion thereof and from digging, mining, and removing phosphate rock and phosphatic deposits therefrom, or from in any manner interfering with or interrupting the quiet possession and occupation of the said Coosaw Mining Company thereof.

Ordered further that the said order of injunction shall remain of force until the further hearing of this cause, with leave to the defendants or any of them to apply to the court for a dissolution thereof upon giving eight days' notice in writing of their intention so to do to the complainants or their solicitors, which notice shall be accompanied with any and all affidavits or other papers upon which the motion for an order dissolving the said injunction shall be based, and with leave to complainants upon such hearing to submit any affidavits or other papers in reply thereto.

Ordered further that the complainants do within ten days from the date of this order enter into bond, with sufficient security, to be approved by one of the judges of this court, in the penal sum of twenty-five thousand dollars, conditioned to pay to the de-
36 fendants herein any and all damage which they may suffer by reason of this injunction if it shall be finally determined that they are not entitled thereto.

CHARLES H. SIMONTON,
U. S. Judge.

6th March, 1891.

Affidavit of Moses E. Lopez.

Before me personally appeared Moses E. Lopez, who, being duly sworn, deposes and saith :

First. That he is the superintendent of The Coosaw Mining Company, the defendants herein; that he has been connected with the said company since their organization in 1870; that at first he was assistant superintendent, his father, the late David Lopez, being superintendent; that upon the death of the said David Lopez, in the year 1882, he became superintendent, and has since had sole control of the operations of the said company as such.

Second. That the said Coosaw Mining Company own a very valuable plant, purchased solely for the purpose of mining phosphate rock and phosphatic deposits from the navigable waters of the State, and which cannot be employed profitably in any other business than that for which it was constructed; that this plant consists of dredges, wash-boats, tugs, lighters, flats, and other vessels too numerous to mention, afloat, of very great value, and many of them filled with machinery most expensive and complicated; that the company have also on shore large and expensive buildings, operative houses, drying sheds, wharves, machine shops, marine railways, ship yards, ground and elevated railway tracks, and all other appliances and buildings necessary properly to carry on their operations and prepare the rock so mined for market; that the amount so invested, afloat and ashore, is very large indeed, over half a million dollars.

Third. That any prolonged suspension of the operations of the company will most seriously interfere with them and cause them irreparable damage; that it is impossible to preserve their machinery, either afloat or in the buildings ashore, on or adjacent to the
37 salt water, unless the same is in operation, and that idleness and non-use will cause it to deteriorate and depreciate in

value to such an extent that in a short time it will become seriously damaged, if not entirely ruined.

Fourth. That in addition thereto the Coosaw Mining Company have, at a great expense of time and labor, gathered together a large force of skilled workmen necessary to carry on their operations and successfully to produce, mine, and deliver the rock in which they deal; that it will be impossible for the company to continue to hold together this organization if they are enjoined by this honorable court; that to scatter abroad so many workmen, who now find profitable employment, will not only cause great loss and damage to them, but will also cause irreparable damage to the company, as it will require years before they can replace a body of workmen so skilled in all the details of their business, if they can ever do so; that the number of workmen so employed by the Coosaw Mining Company varies from time to time from five to six hundred men; that the enforced idleness of so large a number of men having families dependent upon them for support, more or less large, will inevitably tend towards the increase of crime in the county of Beaufort.

Fifth. That this is the most favorable season of the year both for mining and shipping phosphate rock; that at this season vessels are more easily procured than at any other, and at this present time freights are lower and on more favorable terms than they have been for years; that any action of this honorable court by which the operations of the defendants will be suspended will for these reasons also cause them great loss and damage.

Sixth. This deponent further says that the mining in the Coosaw river territory, to which the Coosaw Mining Company claim the continued and exclusive right, has always been carried on under an exclusive right and with the most perfect care and system and according to plans and methods strictly followed for years; that in that way and by that means alone they have been able to produce as large quantities as they have of marketable rock out of the
38 limited territory in which they have conducted their operations; that they have been only able to do so because their mining in the said river has been conducted under their own exclusive management, according to one preconceived system, rigidly followed out, and with the knowledge that, having the exclusive right to mine therein, no interruption of such mining operations would be allowed; that the relators in this action, claiming to act under the authority of the act of the 23rd December, 1890, have issued licenses to sundry other parties to enter into the said Coosaw river territory and to mine therein under what is known as the general rights system, and that the licensees referred to in the complaint therein are the parties to whom such general rights licenses have been granted; that the deponent states from his own knowledge, derived from actual, personal, and continued operations in said Coosaw river territory for nearly twenty-one years, that the inauguration of any such general rights system in the said territory will work to the Coosaw Mining Company irreparable damage, and that if persisted in even for a short space of time will result in absolutely ruining the said territory and injuring the State by render-

ing the said territory of little or no appreciable value; that if the said Coosaw Mining Company is enjoined from operations until a final decree in this cause and in the meantime the other parties are allowed to mine therein, each for himself, the result will be irreparable damage to the Coosaw Mining Company and also injury to the State, and will render their exclusive right, if they should ultimately succeed in this suit, of no practical value to them.

Seventh. This deponent further says that during the entire time of his connection with the said Coosaw Mining Company the officers, inspectors, and agents of the State have, constantly and from time to time, examined the works of the said company and the manner in which they have conducted their operations, and also the manner in which the rock has been weighed and shipped by the said Coosaw Mining Company, and returns of the same made to the State and royalty paid thereon; that this deponent, as super-
39 intendent of the said company, has invariably requested any suggestions or directions from such officers and agents of the State, the plaintiff herein, which would tend to its greater security and to its more safely and absolutely receiving right and proper returns of the rock so mined and the royalty due thereon, and has willingly and readily accepted all such suggestions when made; that no fault has ever been found by any one representing the State since the passage of the act of the 28th of March, 1876, with the manner in which their business has been conducted and their returns made and their royalty paid; that, on the contrary, the universal opinion of all those representing the State who have at any time visited and examined the mining operations carried on in the State's territory, so far as this deponent knows and believes, has been that the operations as conducted by the Coosaw Mining Company were best for the true interests of the State and were yielding the most satisfactory results to it.

Eighth. Your deponent further says that the amount of rock dug, mined, and shipped by the Coosaw Mining Company from the said territory from the time when its mining operations in the waters of the State were first commenced up to now has been greater than the aggregate amount mined from all the rest of the State's territory by all other parties put together who have been mining and paying royalty to the State, and that of the royalty paid into the State's treasury on account of mining operations in her phosphate territory more than half, being nearly one million three hundred thousand dollars, has been paid by the Coosaw Mining Company, and that the average yearly payments of royalty, as appears from the official reports of the State, made to the State by the defendants, The Coosaw Mining Company, are greater than the average aggregate of such payments by all other parties mining in the State's territory put together.

Ninth. And this deponent further says that it is not to the interests of the State that the Coosaw Mining Company should be enjoined, and that it will be to the irreparable damage of the
40 Coosaw Mining Company if such injunction should be granted or if, pending the determination of the rights of the said com-

pany in and to the said Coosaw river territory, other parties should be allowed to mine therein under the licenses granted to such other parties by the State board of phosphate commissioners under the act of 23d December, 1890.

Tenth. And this deponent further says that the parties so licensed by the relators herein under the said act to mine in the said Coosaw territory, as alleged in the complaint, are the Carolina Mining Company, the Farmers' Mining Company, and the Beaufort Phosphate Company; that of these the two first named have been enjoined by the order of the honorable the United States circuit court for the district of South Carolina from mining in said territory; that the Beaufort Phosphate Company is a comparatively small company, operating one dredge and producing about fifteen thousand tons per annum; that the annual average production of all three of these companies, as appears from the official report of the State, is not equal to that of the defendants, The Coosaw Mining Company, alone, and the average annual royalty paid to the State by the defendants is largely in excess of that paid during the same period by these three companies combined.

M. E. LOPEZ.

Sworn to before me this 4th day of April, A. D. 1891.

N. M. PORTER,
Notary Public for S. C. [L. S.]

(Filed 7th April, 1891.)

V.

Suggestion of the Plaintiffs.

And now comes the State of South Carolina, by the Honorable Y. J. Pope, the attorney general of the said State, and gives
41 the court to understand and be informed that there is now pending and being heard before the court of common pleas for Beaufort county the question of the ordering an injunction and continuing its receiver under the rule to shew cause in said court made and returnable on the 7th April, 1891, and also on the question of the jurisdiction of such court.

Y. J. POPE,
Attorney General of the State of South Carolina.

8th April, 1891.

(Filed 8th April, 1891.)

VI.

Special Appearance of the Plaintiffs.

And now comes The State of South Carolina, plaintiff above named, by the Honorable Y. J. Pope, attorney general of the said State, and appears herein for the purpose only of contesting the jurisdiction of this court over the above-mentioned cause and the legality of the

attempted removal of the same from the court of common pleas for Beaufort county and for no other purpose whatsoever.

Y. J. POPE,
Attorney General of the State of South Carolina.

(Filed 8th April, 1891.)

VII.

Reply of the Defendants to the Suggestion of the Plaintiffs.

And now come The Coosaw Mining Company, the defendants herein, and, by way of reply to the suggestion made and filed
42 this day on behalf of the complainants herein by the Honorable Y. J. Pope, attorney general of the State of South Carolina, deny that there is now pending and being heard before the court of common pleas for Beaufort county the question stated in said suggestion or any other question, and that any rule to show cause or order has been made in said court.

On the contrary, these defendants aver and allege that there is no court of common pleas for Beaufort county now in session, and there has been no session of such court since the — day of February, 1891, the said court having adjourned *sine die* on the said — day of February, 1891, and that the next regular term of the said court is fixed by law for the — day of May proximo, 1891.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Defendants' Solicitors.

8th April, 1891.

STATE OF SOUTH CAROLINA, } *ss:*
County of Charleston, }

T. W. Bacot, being duly sworn, says that the matters and facts stated in the within-written reply of the Coosaw Mining Company are true of his own knowledge, and that he is one of the solicitors of the said The Coosaw Mining Company.

T. W. BACOT.

Sworn to and subscribed before me this 8th day of April, A. D. 1891.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

(Filed 8th April, 1891.)

VIII.

Suggestion of the Defendants.

And now come the defendants, The Coosaw Mining Company, and give this honorable court to know and be informed that their
43 petition for the removal of this suit from the said the court of common pleas in and for the county of Beaufort and State

of South Carolina to this honorable circuit court of the United States for the district of South Carolina, together with the bond as required by the acts of Congress in such case made and provided, was duly filed in the office of the clerk of the said court of common pleas on the 30th day of March, A. D. 1891.

That thereafter, to wit, on the 31st day of March, A. D. 1891, they caused their said petition and bond to be formally presented by the hands of Edward McCrady, Jr., Esquire, one of their solicitors, to the Honorable James Aldrich, judge of the second circuit of the State of South Carolina, and his attention called thereto, and that thereafter, to wit, on the 1st day of April, A. D. 1891, they duly entered in this honorable circuit court of the United States for the district of South Carolina a certified copy of the record in this suit in the said court of common pleas.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Defendants' Solicitors.

STATE OF SOUTH CAROLINA, } *ss:*
County of Charleston, }

Edward McCrady, Jr., being duly sworn, says that he is one of the solicitors of the within-named defendants, The Coosaw Mining Company, in the suit within mentioned, and that the matters and facts of the foregoing suggestion are true of his own knowledge.

EDWARD McCRADY, JR.

Sworn to and subscribed before me this 11th day of April, A. D. 1891.

J. E. HAGOOD,
C. C. C. U. S., District of S. C.

(Filed 11th April, 1891.)

44 IX.

Opinion of the U. S. Circuit Court as to Its Jurisdiction.

The summons and complaint in this case were filed in the office of the clerk of Beaufort county, in South Carolina, on 23d March, 1891. The complaint sets forth the ownership by the State of the bed of Coosaw river, including that part of it which "lies opposite to and south of Chisolm's island," and in the phosphate and phosphatic deposits therein; that the Coosaw Mining Company, a joint stock company, claim a perpetual grant to all such deposits in that part of Coosaw river and the exclusive right to mine the same, which claim relators deny; that, notwithstanding such denial, the Coosaw Company continue to assert their claim and hinder and obstruct the relators, who are the duly qualified and appointed board of phosphate commissioners, and all persons authorized by them from mining in said territory; that it is necessary to dispose of this claim, which is based on a certain act of the General Assembly of South Carolina approved 28th March, 1876 (setting out the title of the act), which act relators charge to be in conflict with the

State constitution; that the deposits are of great value, variable, however, in price, and liable in this respect to be affected by the discovery and the production of phosphate rock elsewhere; charges that the Coosaw Company have brought and threaten suits against persons licensed by plaintiffs to mine in this territory, and that this cloud on the State's title should be removed. The prayer is for a perpetual injunction against the Coosaw Company, and in the meantime a restraining order, and also for the appointment of a receiver. After the filing of the complaint an order was made by his honor Judge Aldrich, sitting in chambers at Aiken, containing a rule against the Coosaw Company to show cause before him on 7th April next thereafter why the injunction as prayed for be not granted and why the receiver be not appointed.

In the meantime a restraining order was issued and a temporary receiver appointed without bond. The defendants
45 were served with summons and complaint on 23d March, 1891. On 30th March, 1891, a petition was filed with the clerk of the court of common pleas for Beaufort county for the removal of the cause into this court, accompanied by a bond, with good surety, in the sum of five thousand dollars. The court of common pleas for that county was then and is now in vacation. The next regular term will be held on — of May next. The defendants exhibited a copy of the petition and bond to Judge Aldrich, at Aiken, on 31st March. What action he took does not appear. A copy of the summons and complaint, petition and bond, with exhibits, certified by the clerk of the court of common pleas for Beaufort county, was filed in this court on 1st April. On the 6th day of April the regular term of this court began. On the 7th of April the Coosaw Company came into open court and asked leave to file a return to the rule issued by Judge Aldrich. Thereupon the Hon. Y. J. Pope, who is the attorney general of the State of South Carolina and who appears on the record as plaintiffs' attorney, entered a qualified appearance for the plaintiffs simply to test the jurisdiction of this court. At the same time he filed in writing a suggestion to the court that the rule and the return thereto were then actually being heard before his honor Judge Aldrich, at Aiken, South Carolina.

At the threshold of this case plaintiffs submit two questions to the court: First, Has it jurisdiction of this case? Second, If it has jurisdiction are there not considerations of courtesy and comity towards the State court which will induce it to withhold action?

Has this court jurisdiction of this case? This will depend upon two questions: Is the case removable from the State court to this court? Has it been removed? The case cannot be removed unless it comes within the class of cases arising under the Constitution of the United States, of which circuit courts of the United States are given jurisdiction by the first section of the act of Congress of 1888 (25 Statutes at Large, 434). Section 1 of that act gives to the circuit courts of the United States original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at
46 common law or in equity, where the matter in dispute ex-

ceeds, exclusive of interest and costs, the sum or value of two thousand dollars and arising under the Constitution of the United States. The value of the matter in dispute here is beyond the sum stated. The act makes no exception because of the character of the parties. The sole question, therefore, is, Does this case arise under the Constitution of the United States?

The complaint does not anywhere state the authority upon which it is brought by these relators in the name of the State nor how they became and are the duly appointed and qualified board of phosphate commissioners nor how or when they were authorized to do the acts which it is charged the Coosaw Mining Company obstructs; nor does it mention or refer to any legislative action of the State of South Carolina with respect to the claim of the Coosaw Mining Company to hold her grant. It does allege that the State is the sole owner of the disputed territory; that the Coosaw Mining Company claims a perpetual grant of the exclusive right to mine therein, based upon an act of the General Assembly of that State, whose title and the date of whose approval are stated in the complaint, which the complaint says is invalid. The petition for removal states that the relators are acting under and by the authority of an act of the assembly of this State approved 23rd December, 1890, giving its title at length; that the grant which they have and which they charge is a contract between them and the said State is impaired by said act of 1890; that said act is in violation of the Constitution of the United States in sundry particulars, especially in that it impairs the obligation of a contract.

There can be no doubt that, if the question whether the act of 1890 impairs the obligation of a contract can be made to appear on that part of this record which this court is at liberty to examine at this stage of the proceedings, the case is removable. It is a Federal question, arising under the Constitution of the United States. In the case of Dartmouth College *vs.* Woodward, 4 Wheaton, 518, the legislature of New Hampshire had passed an act materially amending the charter granted by the crown to the trustees of Dartmouth college. It was claimed on the one
47 side that the charter was a contract, and this was denied on the other. If it was a contract the amending act impaired it. The Supreme Court of the United States took jurisdiction of this as a Federal question, discussed whether the charter was a contract, and decided that it was. The decision of the supreme court of New Hampshire to the contrary was reversed and the act was declared invalid. So, in this case, if it can be made to appear from that part of the record which the court is at liberty to inspect that the questions are distinctly made whether there did exist such a contract and whether the act of 1890 impairs its obligation, then it is competent for this court to entertain and decide both questions. (See Bank *vs.* Skelly, 1 Black, 436; Bridge *vs.* Hoboken Co., 1 Wall., 145.) Not only so this Federal question would be the controlling question in the case, for if, on the one hand, the court should decide that there was such a contract and that the act of 1890 impaired its obligation, every provision in that act giving any power or author-

ity to these relators to interfere with the possession of the Coosaw Mining Company and its operations sanctioned by that contract or to give licenses to any person to mine in the disputed territory or to seek an injunction or receiver is null and void. On the other hand, if there be no such contract or the act of assembly does not impair its obligation, the case of the relators must be sustained. So the inquiry is, Is this Federal question presented to this court now? Where in the record must we look for it? The counsel for the plaintiffs, with great learning and force of argument, contend that in making this inquiry the court cannot go outside of the complaint; that the allegations of the petition for removal cannot be used in aid of this inquiry. On the other hand, the counsel for the Coosaw Company, with equal learning and force, insist that, as they seek the jurisdiction and as the plaintiffs seek to escape it, they must not depend upon the allegations of the complaint, but that it is not only incumbent upon them—it is their right—to show the grounds of jurisdiction, and that they can for this purpose use the allegations of the petition for removal.

We will inquire, first, confining ourselves to the complaint
48 without any reference to the allegations of the petition for removal, Does it appear that a Federal question is involved in the case made by it—that is to say, suppose that the parties are heard here on the complaint alone, without any answer or plea setting forth facts not in the complaint, would the Federal question arise? Could the court entertain the question? Was there a contract between the State and the Coosaw Company? Has the State by legislation sought to impair its obligation?

There are certain matters in all causes of which courts will of themselves take notice, and which, therefore, need not be pleaded or proved. Wharton on Evidence, section 277, thus expresses it: "Certain facts or conclusions from facts, however, may be noticed, which may be styled non-evidential, from the fact that they are not proper objects of evidence, and that consequently they may be judicially noticed by the courts." Story in his Equity Pleading, sec. 24, says: "On the other hand, the plaintiffs need not and indeed should not state in the bill any matters of which the court is bound judicially to take notice or is supposed to possess full knowledge. Hence it need not state matters of law * * * or recite public acts or laws or aver facts which the courts are bound judicially to know. * * * A strong illustration of this general rule may be found in the right and duty of the courts of the United States to take judicial notice * * * in an especial manner of all the laws and jurisprudence of the several States in which they exercise an original or an appellate jurisdiction." Chitty, 1 Pleading, 215, says: "Public statutes and the facts they recite or state must be noticed by the courts without their being stated in pleading, and it is only necessary to state facts which will appear to the court to be affected by the statute." And these text writers are fully sustained by the courts. "The law of any State of the Union, whether depending upon statutes or judicial opinion, is a matter which the courts of the United States are bound to take notice without plea or proof"

(Lamar *vs.* Micon, 114 U. S., 223). In Owings *vs.* Hull, 9 Peters, 625, is an application of the rule. "The next objection," say the court, "was that the copy of the original bill of sale
49 of the slaves to Hull on record in the notary's office was not evidence unless the plaintiff accounts for the non-production of the original. The validity of this objection depends upon the consideration whether the non-production of the original was sufficiently accounted for. It was not accounted for by any proof offered on behalf of the plaintiff, and unless the circuit court of the United States could judicially take notice of the laws of Louisiana there was nothing before the court to enable it to say that the non-production of the original was accounted for. We are of the opinion that the circuit court was bound to take judicial notice of the law of Louisiana. * * * It is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of in these courts." In United States *vs.* Randall, Deady, 524, "the courts of the United States take judicial notice of the acts of Congress, and they need not be set forth or specially referred to in any proceeding before them." In Gardner *vs.* The Collector, 6 Wallace, 499, "the courts take judicial notice of the public statutes, and this notice extends not only to the existence of the statute, but to the time when it takes effect and to its true construction." In Starr *vs.* Moore, 3 McL., 354, "in this court it is not necessary to plead or prove a State statute." In Beatty *vs.* Knowles, 4 Peters, 167, "the provision of the act of incorporation that it should be considered a public statute must be regarded in courts of justice, and its enactments must be noticed without being specially pleaded." See also Cheever *vs.* Wilson, 9 Wall., 121; Armstrong *vs.* The United States, 13 Wall., 154. The public laws of a State must be known to and be in the mind of every judge exercising jurisdiction within that State, not only as to their existence, but as to their construction. When a right, privilege, or duty is given to or imposed upon any person, natural or artificial, by a public act, such person can pursue such right, privilege, or duty in the courts, and the courts will, without pleading, producing, or referring to the act, recognize and enforce it. It accompanies the person into court, throwing light upon, explaining, sustaining the record; is in effect a part of the record. So in this case, when the five re-
50 lators, styling themselves the board of phosphate commissioners, bring into court their complaint or it comes before the court in any way, using the name of the State concerning the use of property of the State, asserting the right to control that property, and especially the right to interfere with the claim of the Coosaw Mining Company to property on which that company set up an exclusive privilege under grant, praying the assistance of the court to aid them in their control, protection, and disposition of the State's property, the courts are bound to take judicial notice of the act of 1890, which confers on them these powers, and to take such notice of its own motion. Not only would it be unnecessary but it would be improper to plead the statute or to produce it as their authority (Story on Equity Pleadings, sec. 24). So also the court will take judicial notice of the act of 1876, specially mentioned in the plead-

ing. The court must open the statute book and look into these acts. In the language of Ch. J. Marshall, in Marbury *vs.* Madison, 1 Cranch, 179: "If they can open it at all, what part of it are they forbidden to read?" Thus there are present before the court with this complaint two acts of the legislature of South Carolina. One of them, say the defendants, creates a contract between them and the State, giving them certain exclusive rights in State territory. The other creates the board which the relators claim to be, and by its several provisions seeks to clothe them with powers impairing these contract rights of defendants, and by its general repealing clause seeks to destroy them altogether. Thus there is made in this way, going no farther than the complaint and the acts, which, in contemplation of law accompany and illustate it, an issue which raises a Federal question and would be proper for the jurisdiction of this court.

But is the court, in seeking to ascertain whether a cause is removable, confined to the allegations of the complaint? Is it precluded from examining the petition for removal?

When a petition for removal and bond are filed in the State court the cause is removed (Steamship Co. *vs.* Tugman, 106 U. S., 118).

51 When the record is filed in this court the case will be remanded to the State court if it shall appear to the satisfaction of the circuit court of the United States "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said circuit court" (act of 1875, Supplement to Revised Statutes, 175), and this question the circuit court determines for itself finally (act of 1888, 25 Statutes at Large, 435). The court looks into "the dispute or controversy." These words necessarily require the hearing of both sides, not the *ex parte* statement of one side. So under the act of 1789, in all cases of removal the petition for removal is a part of the record and is examined by the court (Pechner *vs.* Insurance Co., 95 U. S., 183), and under the act of 1875 it was an essential part of the record, and was always examined in determining the removability of a suit (Carson *vs.* Dunham, 121 U. S., 426). In this case it is said that the petition for removal performs the office of pleading; and in Gold Washing and Water Co. *vs.* Keyes, 96 U. S., 203, such pleading is required. Indeed, this must be so from the very nature of the removal acts. They are remedial in their character. The judicial power was granted to the courts of the United States for the common and equal benefit of all the people of the United States. "It was not to be exercised exclusively for the benefit of parties who might be plaintiffs and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights or assert their privileges before the same forum" (Martin *vs.* Hunter, 1 Wheaton, 348). If in determining the character of the dispute or controversy we are confined to the allegations of the complaint, this right of defendant to come into the national forum will depend not on the dispute or controversy, but on the skill of the pleader who draws the complaint. A plaintiff who goes into the State court in a case which really and substantially involves a dis-

pute or controversy within the jurisdiction of the United States court seeks to avoid this court. He carefully eliminates from his pleading every fact which may tend to give jurisdiction to this court. As he goes into a court of general jurisdiction, he can avoid these facts. On the face of his complaint nothing can be seen showing jurisdiction in this court. He may
52 be preparing a suit between citizens of different States or against an officer of the United States for acts done in his official capacity, or for lands held under grants from different States—indeed, on any other of the many grounds for which this court could hold jurisdiction. If the court can look only into the complaint it can never know any fact which would prevent it from remanding the case. The acts of Congress presume, "whether rightly or wrongly we do not inquire, that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice" (Martin *vs.* Hunter, *supra*); hence the provision removing Federal causes into the national courts. But if the position of the plaintiffs be correct, a defendant, however strong his convictions, however conclusive his case, however clear his right, must stand mute before the Federal tribunal whose aid he seeks, and must be remanded to the encounter of these attachments, prejudices, jealousies, and interests, dependent upon the want of skill or the grace of his adversary.

It is supposed that the uniform practice of the Federal courts in treating the petition for removal as part of the record has been changed by the act of 1887–'8. Under the act of 1875 either party could remove a cause and a suit could be brought in a State court, in the subject-matter of which the United States court could not have jurisdiction, and the plaintiff could at once remove it and, under the removal act, create jurisdiction. Such was the case with a suit brought by a citizen of one State, the assignee of an unnegotiable instrument, against the maker, a citizen of another State and of the same State as the assignor. This was an abuse of the privilege of removal. Congress by the act of 1887–'8 corrected the abuse. None but a defendant can remove. No suit can be removed which is not within the original jurisdiction of the circuit court. But no change was made in the practice of removal, although this was well known to Congress. Indeed, in amending the act of 1875 Congress retained the fifth section and confirmed it. The time for the application for removal is changed and all else is retained. The
53 plaintiffs contend that if they could not have originally brought their suit in the Federal court it cannot be removed. But the removal act requires the court to examine into the dispute or controversy and to determine if that is within its jurisdiction. When a suit is brought originally into this court the plaintiff must, on the face of his complaint, show jurisdiction. If he does not the complaint will be dismissed. He may be a citizen of a different State from the defendant. He may hold lands under grant from another State. If he fail to show this on the record he is dismissed.

So, when it is sought to remove a case from the State to the Federal court, unless the defendant can in his record show jurisdiction he will be dismissed. But as the question is as to the "dispute or controversy," if he can show in his petition that notwithstanding the skillful statements and omissions of the plaintiff the suit really and substantially involves a dispute or controversy properly within the jurisdiction of this court, he will not be dismissed. This distinction clearly appears in Metcalf *vs.* Watertown, 128 U. S., 589. It will be noticed that the question is, Does the suit involve a dispute or controversy substantially and really within this jurisdiction? That is to say, in its nature and essence, not whether, as an incident to the cause, a matter which might become a part of a defense, a fact *de hors* the record, may or may not raise a Federal question, but whether the real, substantial, fundamental issue made in the record, including the petition, is one over which this court by the law under the constitution has jurisdiction. To this extent and no further I concur with Judge Shirras in Dey *vs.* Chicago, 45 Fed. Rep., 84. Several courts of the United States, since the act of 1887–'8, treat the petition as part of the record. State of Illinois *vs.* Illinois Central R. R., 33 Fed. Rep., 725; Austin *vs.* Gagan, 39 Fed. Rep., 826; McDonald *vs.* Salem, 31 Fed. Rep., 577; Johnson *vs.* Accident Ins. Co., 35 Fed. Rep., 374. See also Foster on Fed. Pro., 385.

It appearing from the record in this case that the suit really
54 and substantially involves a dispute or controversy whether the State of South Carolina has not passed an act impairing the obligation of a contract alleged to have been made between the said State and the defendants, the cause presents a question within the original jurisdiction of this court (R. R. Co. *vs* California, 118 U. S., 113) and is removable.

The next question is, Has the cause been removed? This being a removable case, as soon as the petition and bond were filed in the State court its jurisdiction absolutely ceased and that of this court immediately attached. R. R. Co. *vs.* Miss., 102 U. S., 135; R. R. Co. *vs.* Koontz, 104 U. S., 5; Steamship Co. *vs.* Tugman, 106 U. S., 118; Crehore *vs.* Ohio, &c., Railway Co., 131 U. S., 244.

The last question which we are asked to examine is, Are there not considerations of comity or courtesy which would induce this court to withhold action? The petition for removal and bond were filed in the court of common pleas for Beaufort county some days before the regular term of this court. Although it was the duty of the defendants removing to bring their case to this term (Brown *vs.* Murray, 45 Fed. Rep., 614), I would, in courtesy to the State court, have withheld action until it could meet and receive the petition. The course of Judge Gresham in Shield *vs.* Fuller, 36 Fed. Rep., would have been followed; but it has been brought to the attention of the court that the petition and bond were presented to the State judge charged with the case, and that he passed upon it. No discourtesy to the State court can now be supposed. Its action cannot in any way affect the course of this court in determining upon the right of removal.

With regard to considerations of comity, they have no place here.

The question is one as to the right of the citizen, not as to the conduct of the court. Had an action been brought in this court after the jurisdiction of the State court had been engaged over the subject-matter in another action, then this court could properly consider whether it ought not to leave the parties to the tribunal first charged with the settlement of the dispute; but this is a case brought in the State court, removed into this court. In en-
55 tertaining the petition for removal, this court cannot mean any reflection upon the State court. It simply considers whether the petitioners have the right to the removal. If they have, refusing it would be a denial of right.

CHARLES H. SIMONTON,
U. S. Judge.

21 April, 1891.

(Filed 21st April, 1891.)

56 X.

Answer of the Defendants.

The answer of The Coosaw Mining Company, defendants herein, to the bill of complaint of the above-named plaintiffs.

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto or to so much thereof as they are advised it is material or necessary for them to make answer unto, answering, say:

1st. They deny each and every allegation in the said bill of complaint contained except in so far as the same may be hereinafter specifically admitted or denied.

2nd. Answering paragraph 1, they admit so much thereof as alleges that the Coosaw river, in Beaufort county, in the State of South Carolina, is a navigable stream; and as to the other allegations of the said paragraph they allege that they have no knowledge or information sufficient to form a belief as to the same, and therefore do not admit, but deny, the same.

3d. Answering paragraph 2 of the said complaint, they admit that these defendants, The Coosaw Mining Company, are an unincorporated joint stock company or mining partnership, and that they have duly recorded their articles of agreement as required by the provisions of an act of the General Assembly of the State of South Carolina entitled "An act to protect the rights of creditors of joint stock companies and to regulate the same," approved December 23d, 1879; a copy of which said articles is hereto annexed as part and parcel of this answer, marked "Exhibit A."

4th. Answering paragraph 3, these defendants admit that they have for some time past been engaged in digging, mining, and removing phosphate rock and phosphatic deposits from the bed of so much of the Coosaw river aforesaid as lies opposite to and south of Chisolm's island, whereon their works are located, and to the marshes thereof, embracing that portion of said river which lies west of a line drawn due south from the point of junction of Bull and Coosaw

rivers and east of a line drawn due south from the mouth of
57 Adams creek; and they allege that they have done so under a legal and valid right so to do, as is hereinafter more fully set out in this answer.

And, further answering the said paragraph, they deny the other allegations thereof.

5th. Answering paragraph 4 of the said complaint, these defendants admit so much thereof as alleges that they continue to assert their right to dig, mine, and remove phosphate rock and phosphatic deposits from the bed of Coosaw river aforementioned, and that in order to protect such right they have served notices upon sundry persons and parties unlawfully undertaking to trespass upon and dig, mine, and remove phosphate rock from said territory, protesting against their action in so doing, and that they have begun proceedings in this circuit court of the United States for the district of South Carolina to enjoin and prevent such persons from digging, mining, and removing the said rock and from occupying and possessing the bed of the said river as aforesaid, as is in this answer hereinafter more fully set out; and these defendants allege that they have a legal right so to do.

And, further answering the said paragraph, these defendants deny the rest of the same.

6th. Answering paragraph 5 of the said complaint, these defendants admit so much thereof as alleges that the said bed of the Coosaw river contains a very valuable bed or stratum of phosphate rock and phosphatic deposits, and that it is of importance that the same be mined without obstruction; but these defendants allege that they alone are legally entitled to the occupation and possession of the said bed of Cooksaw river, and they alone are legally authorized to dig, mine, and remove phosphate rock therefrom.

And, further answering the said paragraph, these defendants deny the further and other allegations thereof.

7th. Answering paragraph 6 of the said complaint, these defendants say that they have no knowledge or information sufficient to form a belief as to the sources of the income and revenue of the State of South Carolina, but they allege that these defendants alone are legally entitled to mine and utilize the phosphatic deposits in the bed of Coosaw river aforesaid.

58 And, further answering the said paragraph, these defendants deny the allegations thereof.

8th. Answering paragraph 7 of the said complaint, these defendants admit so much thereof as alleges that the rights of the said Coosaw Mining Company in and to the bed of the said Coosaw river and the phosphate rock and phosphatic deposits therein contained are based upon a certain act of the General Assembly of the State of South Carolina, approved 28th March, 1876, entitled "An act to settle definitely the periods at which returns shall be made of phosphate rock and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina and the royalty shall be paid thereon, and also to fix the *the* terms on which this act may be accepted by the parties named therein."

And, further answering the said paragraph, these defendants deny the other allegations thereof.

9th. Answering paragraph 8 of the said complaint, these defendants deny that the plaintiffs or any person other than these defendants are entitled to the occupation and possession of the said Coosaw river territory or to dig, mine, and remove the phosphate rock from the bed thereof.

And, further answering the said paragraph, these defendants deny the other allegations of the same.

10th. Answering paraagraph 9 of the said complaint, these defendants say that they have no knowledge or information sufficient to form a belief as to the same, and therefore do not admit, but deny, the same.

11th. Answering paragraph 10 of the said complaint, these defendants admit that they have instituted proceedings in this honorable circuit court of the United States for the district of South Carolina against certain parties who have unlawfully entered and trespassed upon the said Coosaw river territory or who have attempted to dig, mine, and remove phosphate rock and phos-
59 phatic deposits therefrom, as is hereinafter more particularly set out in this answer; but they allege that in so doing they have acted properly, inasmuch as the said proceedings were for the purpose of legally protecting their rights.

And, further answering the said paragraph, these defendants allege that they were legally entitled and authorized to institute the said proceedings in order to protect their territory and their rights therein, and they deny that this court can or should enjoin them from so doing.

And, further answering, they deny the other allegations of the said paragraph.

12th. And, further answering, these defendants allege that some time prior to the year 1870 it was discovered that The State of South Carolina, the plaintiff herein, was possessed of a large amount of phosphate rock and phosphatic deposits, which was supposed to be of great value on account of the bone phosphate of lime therein contained; that said phosphate rock and phosphatic deposit lay in the beds of certain of the navigable streams of the State and at very considerable depths below the surface of the water, and also in such marshes as had not been theretofore granted by the State; that the value of this rock and deposit was dependent, however, upon its development; that to make it available such deposit had to be mined, prepared for and placed upon the market.

That, although the fact that such deposits existed in the beds of such rivers and streams had been thus ascertained, they had, up to that period, never been mined or placed on the market; nor, so far as these defendants are informed and believe, had any mining operations of deposits similar in character and located in deep water ever been known or carried on either in the waters of the said State or elsewhere; nor had Carolina phosphate rock ever been produced or sold, and it was an unknown product in the markets of the world.

That the development of this deposit required not only the investment and outlay of very large amounts of capital and labor, but also the highest mechanical skill in devising and operating
60 methods for mining and preparing such deposit for market, and, in addition, the best and most efficient commercial tact and experience in order to handle the product and place it in the market in the face of competing phosphatic deposits.

That the plaintiff, The State of South Carolina, was wholly unable by any resources at her command to undertake and successfully accomplish such a development of these deposits.

13th. That to induce other parties to venture upon the development of these valuable deposits the General Assembly of the State of South Carolina, by an act passed on the first day of March, 1870, granted to certain persons named therein, to wit, George W. Williams and others, and such other persons as they may associate with them the right to dig, mine, and remove, for the full term of twenty-one years, from the beds of the navigable streams and waters within the jurisdiction of South Carolina the phosphate rock and phosphatic deposits, upon the condition that the said grantees should pay to the State of South Carolina the sum of one dollar per ton for every ton of phosphate rock and phosphatic deposit so dug, mined, and removed.

That the said act further provided that before commencing operations under the authority thereof the said grantees and their associates should file or cause to be filed in the office of the State auditor a bond in the penal sum of fifty thousand dollars conditioned that said grantees and their associates should make true and faithful returns to said auditor annually on or before the first day of October and oftener, if required by said auditor, of the number of tons of phosphatic deposits dug, mined, and removed by them from the beds of the navigable streams and waters of the State, and should punctually pay to the State treasurer annually on the first day of October one dollar per ton for every ton of phosphate rock and phosphatic deposits by them dug, mined, and removed from the beds of the navigable streams and waters of the State during the year preceding, the said bond to be renewed annually and approved by the attorney general.

14th. That by a certain deed and article of agreement bearing date the 15th day of March, 1870, the said grantees, George
61 W. Williams and others, made known and declared the names of the persons who were their associates referred to as cograntees in the said grant, and in and by the said deed it was covenanted and agreed by and between the said grantees and their associates that one of them, namely, George S. Brown, the owner of a part of Chisolm's island and a citizen of the State of Maryland, together with certain other associates therein named, should have, occupy, and possess the Coosaw river for the purpose of mining under the said grant, to the exclusion of the other grantees and associates, and that they, the said George S. Brown and certain others aforesaid, should be excluded and abstain from exercising

their rights under the said grant elsewhere than in the said Coosaw river.

That the said George S. Brown and the associates with him, to whom the Coosaw river was thus set apart, uniting several other persons with them, soon after the execution of the articles of agreement, formed a joint stock company or mining partnership for the purpose of exploring and mining the phosphate rock and phosphatic deposits in the bed of the Coosaw river, which has ever since been known as the Coosaw Mining Company, and after some discouragement and failure finally established themselves on Chisolm's island and occupied so much of the said river as lies opposite to and south of Chisolm's island, whereon their works are located, and to the marshes thereof, embracing that portion of said river which lies west of a line drawn due south from the point of junction of Coosaw and Bull rivers and east of a line drawn due south from the mouth of Adams creek, and procured plant sufficient to engage in the business of mining the phosphate rock and phosphatic deposits to be found in the said river.

15th. That the defendants, the said Coosaw Mining Company, gave their own separate bond, as the said Coosaw Mining Company, to the comptroller general of the State in the year 1872, which bond was accepted by the said comptroller general, and the said Coosaw Mining Company thereafter paid the royalty annually directly to the State treasurer, as required by the terms of the said grant, and carried on their mining operations until the said Coosaw
62 Mining Company had paid into the treasury of the State, as royalty, the sum of seventy-four thousand and seventy-three dollars, when a difference of opinion arose between the then comptroller general, T. C. Dunn, and the said company as to the interpretation of the act which had theretofore prevailed in reference to the mode in which the royalty should be ascertained to be due and payable.

16th. That the said comptroller general of the State, in a communication to the secretary of the Coosaw Mining Company dated 2d October, 1875, set up a claim that the State was entitled under the grant to royalty on all rock dug, mined, or removed—that is to say, that the State was entitled to the royalty on all rock mined, whether the same was removed for shipment or not, the said Coosaw Mining Company up to that time having paid only on what *company up to that time having paid only on what* rock was removed and shipped to market; thereupon the said defendants, The Coosaw Mining Company, referred the said demand to their solicitor, Mr. Edward McCrady, Sr., for his opinion as to their obligation to comply, who, after a careful examination of the question, gave a written opinion thereon advising that the demand of the comptroller general should be refused, as it was not the mere lifting of rock from the bed of the river, but the fitting and setting it out on its way to market, which made the defendants liable for the royalty, and that the exportation was a convenient mode of ascertaining the amount so due.

That, upon the refusal of the defendants to pay the royalty as demanded, the comptroller general determined to apply to the legis-

lature for legislation upon the subject, and learning of this the said defendants caused to be printed the said opinion of their counsel, copies of which were distributed to the members of the legislature; that the attention of the legislature was thus brought to the subject, but that these defendants made no application to the legislature nor did they seek any legislative relief.

17th. That, the subject of the development of its phosphate
63 deposits and the collection of royalty thereon and of these defendants' connection therewith having been thus brought to the attention of the legislature, upon the application and at the instance of the comptroller general of the State an act was passed after a full discussion of the whole subject and of the true interests of the State therein on the 28th March, 1876, entitled "An act to settle definitely the periods at which returns shall be made of phosphate rocks and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina and the royalty — shall be paid thereon, and also to fix the terms on which this act may be accepted by the parties named therein."

That the said act commenced with a recital that "Whereas differences have arisen between the Coosaw Mining Company and the comptroller general as to the times and manner in which the said company shall make their returns of the number of tons of phosphate rock and phosphatic deposits dug, mined, and removed by them from the beds of the navigable streams and waters of the State, and also as to the times when the royalty thereon shall be paid, therefore, for remedy thereof," the act proceeded to provide that the said Coosaw Mining Company and all other companies and persons engaged in digging, mining, and removing phosphate rock and phosphatic deposits from the beds of the navigable streams and waters of the State should be, and they were thereby, required, from and after the passage of the act, to make to the comptroller general full and faithful returns of the number of tons of phosphate rock and phosphatic deposits they had so dug, mined, and removed and shipped or otherwise sent to market at the end of every month, and to punctually pay to the State treasurer the royalty already provided by law to be paid thereon, to wit, one dollar per ton, at the end of every quarter, to commence to run on the first day of March of that year—1876.

The act provided, further, that the Coosaw Mining Company and all other companies and persons mentioned in the preceding sections should within ten days from the passage of the act enter into
64 new bonds in the penal sum and in the manner and form already provided by law, to wit, in the penal sum of fifty thousand dollars, but conforming in their conditions to the terms set forth in the preceding section, and also to anticipate the period then provided for the payment of royalty and to pay to the State treasurer the royalty accrued up to the first day of March in that year—1876.

18th. That during the discussion between the comptroller general and the said Coosaw Mining Company as to the right of the State to change the provisions of the grant under the act of 1870 by re-

quiring returns of rock mined and payments thereon to be made monthly and quarterly instead of annually, the said Coosaw Mining Company had assumed the position that they had a definite and irrevocable grant without provision for forfeiture even upon the non-payment of royalty for the full term of twenty-one years from the year 1870, and that, having already under the provisions of said grant occupied the Coosaw river with sufficient plant, they were entitled to retain the exclusive occupation thereof and to enjoy the exclusive right to dig, mine, and remove the phosphatic deposit therefrom.

19th. That up to this time about six companies had engaged in the business of mining in the navigable waters of the State, some of whom were so mining under direct charters from the State; that of these only two, to wit, these defendants and the South Carolina Phosphate Company, Limited, otherwise called the Oak Point mines, had established and restricted themselves to a particular location. The other companies had been engaged in mining in a desultory way wherever they could find a good supply of rock; but experience had already shown that the true interest of the State was to induce miners to restrict themselves to certain definite locations within fixed limits and with sufficient plant to properly mine the same until the deposit therein contained should be exhausted; and therefore and for the best interests of the State that the companies so mining in her waters should be offered sufficient inducements to so locate and restrict their mining operations.

65 20th. That up to this time the mining of the said deposit had hardly passed its experimental stage; that no company engaged in it, so far as these defendants are informed and believe, had paid any dividend or return to those who had invested their money, except some small amounts paid just before that time by these defendants, and it was well known that, with the exception of these defendants and the said South Carolina Phosphate Company, Limited, the companies engaged in such mining operations were financially weak, and one of them, the Marine and River Phosphate and Manufacturing Company, was notably in embarrassed circumstances and in debt to the State; that, as matter of fact, nearly all of them subsequently failed, and all are now out of the business.

That it was, therefore, of consequence to the State to protect and foster this industry so important to her finances and to encourage those interested in the companies mining in her territory to continue their efforts and, if necessary, invest additional amounts in plant and machinery necessary to further develop and mine her deposits.

21st. That to this end it was the interest and effort of the State to provide by additional legislative contracts so as to secure the payment of her royalty at frequent and short intervals, secured by sufficient bonds, and at the same time to offer to the said companies increased inducements by enlarging and extending their privileges so as to give them the exclusive and continuing right to occupy and mine in certain definite and fixed territory so long as they made true returns and punctually paid the royalty due, and that

such rights should continue, dependent only upon the fulfilment of such conditions, until all the phosphate rock and phosphatic deposits in such defined territory should be exhausted; that the State thereby secured true returns and punctual payment on pain of the forfeiture of the grant and the working of the territory systematically and thoroughly, while the companies mining were encouraged to continue their operations and increase their investments and to work with system and care under the agreement that they
66 should be unmolested in the occupation of the defined territory and in their operations therein until they had exhausted the deposit there to be found.

22d. That in this view and to accomplish these purposes the act of 1876 went on to and did declare and fix the terms on which the said act might be accepted by the parties named therein, as follows:

"And whereas it is desirable that the Coosaw Mining Company and all other companies and persons engaged in digging, mining, and removing phosphate rock and phosphatic deposits as aforesaid shall accept the terms of this act in order to make it binding on them respectively;

"And whereas the said Coosaw Mining Company have already occupied so much of the Coosaw river as lies opposite to and south of Chisolm's island, whereon their works are located, and to the marshes thereof, and have expended large sums of money in establishing themselves thereon with sufficient mining plant for mining and preparing for market the phosphate rock and phosphatic deposits of that part of the said Coosaw river:

"Therefore, in consideration thereof,

"SECTION 3. That the said Coosaw Mining Company, on accepting the terms of this act within ten days from the passage thereof, shall thenceforth have the exclusive right to occupy and dig, mine and remove, phosphate rock and phosphatic deposits from all that part of the said Coosaw river above mentioned so long as and no longer than they shall make true and faithful returns of the number of tons thereof they shall so dig, mine, and remove and ship or otherwise send to market and punctually pay the royalty thereon, as provided in the first section of this act."

That by section 4 of said act all other persons or companies engaged in digging, mining, and removing phosphates under the gift or grant of the State were offered the same right of accepting the terms of the act within ten days from its passage and were thenceforth entitled to all the rights and subject to all the limitations therein contained.

That by section 5 of said act all acts or parts of acts inconsistent therewith were thereby repealed.

That the said act will be found at large in volume XVI of
67 the Statutes of South Carolina, page 198, to which these defendants crave reference as fully and as often as may be found necessary.

23rd. That, in consideration of the terms offered by the State, to wit, the exclusive right to occupy and mine phosphate rock and

phosphatic deposits from the territory above mentioned so long as the said company would punctually pay the said royalty at the time specified, the said company accepted the provisions of the said act within ten days from its passage and at once paid the royalty accrued up to the first day of March of that year, 1876, and entered into new bond conforming in its conditions to the terms of the said act, which sum of money and new bond were accepted by the treasurer and comptroller general of the State as in full compliance with the terms of the said act, and that a contract under the said act was thereby entered into between the State of South Carolina and the said company.

That the said bond so given by these defendants and accepted by the State was essentially different from that required theretofore to be given by these defendants, and these defendants annex hereto copies of the said bonds as part and parcel of this answer as Exhibits "B" and "C" and crave reference thereto whenever it may be deemed necessary.

That the other companies then mining in the State's territory also accepted the provisions of the said act.

That such action on the part of these defendants was entirely voluntary, as it was optional with them whether they should accept the terms of the new contract offered them or hold to that then in existence between them and the State, and which said contract the State, except with the consent of these defendants, was without power to change or alter.

24th. That, on accepting the contract as offered by the said act of 1876, the right thereby conferred was to continue indefinitely and until the exhaustion of the phosphate deposit contained in the territory indicated, unless forfeited by the failure of these defendants to comply with its conditions; that these defendants so accepted the said contract was well known to the State and the public generally.

That these defendants at that time and ever since have consistently held under such contract, and that their position in reference thereto has always been known to the State and to the public.

That the General Assembly of the said State has, up to the
68 times hereinafter mentioned, dealt with these defendants on such basis of said contract and have taken no action inconsistent therewith.

25th. That soon after the acceptance of the said act of 1876, and because the right thereby conferred upon these defendants was continuing upon the conditions named, these defendants proceeded to invest and expend very large amounts of money, in addition to that already invested and expended by them, in the procurement of additional dredges, wash-boats, and tugs, and the erection of additional drying sheds, wharves, and other plant on shore, for the purpose of extending their operations and engaging more largely in the business of mining such deposits and preparing them for market.

That the additional amount so invested and expended was nearly two hundred and fifty thousand dollars; that while these defendants had already a large mining plant in Coosaw river, yet after the

acceptance of the said contract they thus added most largely thereto; and these defendants aver and say that such increased investment and expenditure was made by them solely in consideration of the terms of the said contract and because the right therein conferred was continuing so long as they made faithful returns and punctual payment of royalty for the rock dug, mined, shipped, or otherwise sent to market by them; and these defendants allege that their mining plant was and is sufficient for mining and preparing for market the phosphate rock and phosphatic deposits of the part of the Coosaw river as granted to them.

26th. That the said Coosaw Mining Company have, from that time to the commencement of this proceeding, exclusively occupied and dug, mined, and removed phosphate rock from the said territory, and have punctually paid the royalty as required by the said act and fully complied with every condition and requirement of the said act and of the contract thereof, and that no complaint has from that time up to the commencement of this proceeding ever been made to these defendants by the plaintiff, the said State of South Carolina, or any officer or agent of the said State of any failure or default on the part of these defendants to fully and faithfully comply with all of the said conditions and requirements in every particular.

27th. That from the said first day of March, A. D. 1876, up to the time of the filing of the complaint herein these defendants have paid into the treasury of the State, in cash quarterly payments, the
69 sum of one million two hundred and twenty-three thousand seven hundred and twenty-six $\frac{94}{100}$ dollars, making with the amounts previously paid by them to the State a total payment of one million two hundred and ninety-seven thousand seven hundred and eighty-nine $\frac{94}{100}$ dollars; that this amount has been paid to and received by the said State in cash, without the investment on the part of the State of one dollar and without any risk or expense on its part whatsoever; that the amounts so paid by these defendants *is* greater than the total amounts received by the State from all other persons or companies mining phosphate rock in her territory.

28th. That the said State of South Carolina, disregarding its obligations and contract and in violation of the tenth section of the first article of the Constitution of the United States of America, which provides that no State shall pass any law impairing the obligation of contracts, did, on the 24th day of December, 1890, pass an act entitled "An act to create a board of phosphate commissioners, defining its purposes and duties," which said board was charged with the exclusive control and protection of the rights and interests of the State in the phosphate rock and phosphatic deposits in the navigable streams and in the marshes thereof, and by which said act it was expressly provided and enacted as follows:

"SECTION 10. That the said board of phosphate commissioners are hereby authorized and directed after the first day of March, 1891, to take possession and control of the Coosaw river phosphate territory heretofore occupied by the Coosaw Mining Company, and to issue licenses to mine therein, and remove phosphate rock and phosphatic deposits therefrom, in like manner as is now provided by

law for the other navigable streams and waters of the State: Provided, that such parties so licensed or authorized shall be deemed the agents of the State, and each ton of phosphate rock or phosphatic deposits, the product of such mining operations, shall be deemed the property of the State until the said parties shall have paid thereon a royalty, to be fixed by the said commission, at not exceeding two dollars per ton on each ton of phosphate rock or phosphatic deposit dug, mined and removed, provided six months' notice shall be given before raising royalty above one dollar."

29th. That by other sections of the said act an attempt is made by the said State of South Carolina further to impair the obligation of its said contract by providing that if any person or persons shall mine or attempt to mine any phosphate rock from the
70 said Coosaw river without a license from the board of phosphate commissioners so to do such person or persons shall be punished for each such attempt by fine and imprisonment, thus annulling and abrogating the contract heretofore made with the said Coosaw Mining Company, by which they were to be allowed to mine the said rock and deposits so long as they, the said company, should pay the royalty of one dollar due thereon, and thus attempting to make it a criminal offense on the part of these defendants to exercise their rights uuder the said contract.

30th. That further to impair the obligation of the said contract the said State of South Carolina by the said act provided that should any person or persons attempt to mine or remove phosphate rock and phosphatic deposits from the said Coosaw river phosphate territory after the said first day of March, 1891, by and with any boats, vessels, marine dredges, or other appliances for the same without the leave or license of the said board of phosphate commissioners thereto first had and obtained all such boats, vessels, marine dredges, and other appliance, were thereby declared forfeited to and the property of the State of South Carolina; and it was made the duty of the attorney general for and on behalf of the State to institute proceedings in any court of competent jurisdiction for the claim and delivery thereof, in which actions the title of the State shall be established by the proof of the commission by the person or persons owning the same or their agents in possession of such boats, vessels, marine dredges, or other appliances of any such act of forfeiture, and the State is expressly released from the necessity of giving bond in such action as is required by the law of the State from every other person instituting proceedings of like nature.

That the said act will be found at large in volume XX of the Statutes of South Carolina, page 691, to which they crave reference as fully and as often as may be necessary.

31st. And these defendants further charge and allege that the said act of the legislature of South Carolina of 1890 is further repugnant to the 5th and 14th amendments to the Constitution of the United States in that the legislature thereby sought to deprive the defendants of their property without due process of law, and denies to them within the jurisdiction of the State of South Carolina the equal protection of the laws of the State of South Carolina.

32nd. That the relators in this action claim to have been created and appointed the board of phosphate commissioners under and by the terms of the said act of December 23rd, 1890, and derive all authority and position which they may have and attempt to
71 exercise solely from said act; that under and by the terms of the said act the relators so constituting the said board are authorized and directed for and in the name of the State, plaintiff herein, to enter upon and take possession of the said Coosaw river territory theretofore exclusively occupied by these defendants and to issue licenses to other parties to enter and mine therein as agents of the said State, and that they derive their authority so to do from no other source than the said act; that in attempting to take possession of the said Coosaw river territory and in issuing licenses to other parties or persons to mine therein as agents of the said State and in doing other acts, as is alleged in the complaint herein, they are acting solely under and by the authority of the said act of December 23rd, 1890, and that the institution of this present suit and these proceedings is solely under and in pursuance of the provisions of the said act of December 23rd, 1890; all of which said actings and doings are in violation of the said contract of these defendants with the said State and impair the obligation thereof.

33rd. And these defendants further allege that the said B. R. Tillman, Y. J. Pope, W. H. Ellerbe, J. D. Montgomery, and G. H. Walter, under color of the said unconstitutional legislation of the said State, to wit, the said act of December 23rd, 1890, and in execution of the provisions thereof, and in violation of the personal and property rights of these defendants, did, prior to the institution of these proceedings, to wit, on or about the — day of February, A. D. 1891, give notice in the public newspapers and journals that they would open the said Coosaw river to general rights to mine therein on and after March 1st, 1891, and in like manner directed persons desiring licenses to mine therein to apply to them, the said *defendants*, therefor.

And the said relators, B. R. Tillman, Y. J. Pope, W. H. Ellerbe, J. D. Montgomery, and G. H. Walter, did further, to wit, on the 24th day of February, 1891, issue a public circular to all parties interested in the business of phosphate mining, and did cause the same to be published in the public prints, notifying all persons that all exclusive rights would cease on and after the first day of March, A. D. 1891, in any of the phosphate territory of the State, and offering to issue licenses to other parties to mine in the territory of these defendants upon the terms therein stated, a copy of which circular is hereto attached as Exhibit "D."

That included in such terms is the requirement that the parties so asking for and receiving such license to mine in the said Coosaw territory, to the exclusive occupation of which these defend-
72 ants are entitled as aforesaid, shall stipulate by bond that they are and each of them is the agent of the State of South Carolina in such mining operations, and the rock mined in such territory shall be held and taken as the property of the said State until the royalty is paid; that these stipulations are in accordance

with the provisions of the act of 1890 aforesaid, and these defendants charge that the said parties are and were to be in no sense the agents of the State, but that such stipulations are and were inserted in the said bond solely to defeat, if possible, the jurisdiction of this honorable court and to prevent these defendants from obtaining the relief and redress herein to which they are justly entitled.

That the action of the said Benjamin R. Tillman, Y. J. Pope, W. H. Ellerbe, J. D. Montgomery, and George H. Walter in the said premises is and was calculated to cause great damage and loss to the said Coosaw Mining Company, to an amount far exceeding the sum of ten thousand dollars.

34th. That thereupon, and incited and encouraged by the actions of the relators, said B. R. Tillman, Y. J. Pope, W. H. Ellerbee, J. D. Montgomery, and G. H. Walter, as aforesaid and in pursuance of said notice, sundry persons applied to them, the said Benjamin R. Tillman, Y. J. Pope, W. H. Ellerbe, J. D. Montgomery, and George H. Walter, for licenses and authority to enter upon the territory of these defendants and to occupy the same and dig, mine, and remove the phosphate rock and phosphatic deposits therefrom, and, in violation of the personal and property rights of these defendants in the premises and in derogation of such rights and against their protest and under color of the said unconstitutional legislation of the said State and for the purpose of aiding and assisting the said persons in their said trespasses upon the territory of these defendants, the said parties, who in this present action style themselves the said relators, left their usual places of residence in the cities of Columbia and Charleston and elsewhere, in the said State, and went to the town of Beaufort, in the immediate neighborhood of the territory of these defendants, and then and there issued licenses to the Carolina Mining Company and the Farmers' Mining Company, and thereby authorized, empowered, and incited and encouraged the said Carolina Mining Company and the Farmers' Mining Company to enter and trespass upon and occupy and dig, mine, and remove phosphatic deposits from the Coosaw river in the territory so occupied by these defendants and to the exclusive occupation of which they are entitled under their contract with the State as aforesaid.

And, further, that they, the said Benjamin R. Tillman, Y. J.
73 Pope, W. H. Ellerbe, J. D. Montgomery, and George H. Walter, together with one A. W. Jones, claiming to have been appointed phosphate inspector under the said act of 1890, in furtherance of their unlawful purpose and to still further aid and encourage the said Carolina Mining Company and Farmers' Mining Company in their unlawful acts, did in person, unlawfully and against the protest of these defendants, enter and trespass upon the territory of these defendants above described, and did personally direct and instruct them, the said Carolina Mining Company and Farmers' Mining Company, to enter and trespass thereupon.

35th. That, in pursuance of the said action of the said Benjamin R. Tillman, Y. J. Pope, W. H. Ellerbe, J. D. Montgomery, George H. Walter and A. W. Jones and at their instigation and by their counsel and advice and with their aid and assistance and under

color of the said unconstitutional legislation of the said State and under the said licenses issued thereunder, the said Carolina Mining Company and Farmers' Mining Company, wrongfully and in violation of the rights of these defendants therein, entered and trespassed upon the territory of the Coosaw Mining Company, which had hitherto been occupied and mined by them under the grant of the act of 1876 and the exclusive occupation and right to mine in which was guaranteed to them, the said Coosaw Mining Company, and in violation of the rights of these defendants therein under the terms of the said act commenced to dig, mine, and remove phosphate rock and phosphatic deposits therefrom, and to thus diminish and deprive these defendants of the revenue they might reasonably expect to receive by means of their exclusive right to occupy, dig, and mine and remove phosphate rock and phosphatic deposits therefrom, to an amount far exceeding ten thousand dollars.

36th. And these defendants further allege that the grant, right, and privilege which they have and to which they are justly entitled under their contract with the said State under and by virtue of the terms of the act of 1876, above set forth, is of great value and largely in excess of the value of ten thousand dollars; that the action of the plaintiff herein would, if persisted in, have entirely destroyed the right and privilege and the value to these defendants of the said grant and contract and would have caused irreparable injury and damage to these defendants.

That these defendants would thereby have been unable to carry on their mining operations; that their immense plant, both on shore and afloat, is calculated for such mining operations and
74 no other, and that by such action it will be rendered useless and of no value, and these defendants' entire business would have been irremediably ruined, and that these defendants had no adequate remedy at law for their relief in the premises.

That the trespass so being committed by the said parties was continuing and would have tended to the waste and destruction of the minerals in the territory of these defendants, as above described, and have caused repeated litigation and a great multiplicity of suits, and for all of which wrongful acts there was no adequate remedy at law.

37th. That thereupon and in order to protect their rights and property these defendants did, on or about the 6th day of March, A. D. 1891, institute proceedings against the said B. R. Tillman, Y. J. Pope, W. H. Ellerbe, J. D. Montgomery, and George H. Walter and A. W. Jones and the said Carolina Mining Company and Farmers' Mining Company, in this honorable circuit court of the United States for the district of South Carolina, praying for an injunction and other relief.

That in the said proceedings were fully set out all the matters and things hereinbefore referred to, and that the object of the said proceedings was to protect the rights of these defendants, under their contract with the State, against the said unconstitutional legislation of 1890 and against the said B. R. Tillman and others pretending and alleging to act thereunder.

That this honorable court thereupon and before the commencement of this present suit granted its restraining order against the defendants therein, to wit, the said B. R. Tillman, Y. J. Pope, W. H. Ellerbe, J. D. Montgomery, and George H. Walter and A. W. Jones and the said Carolina Mining Company and Farmers' Mining Company, enjoining them from in any manner interfering with the rights and territory of these defendants; that the said proceedings are now pending in this honorable court.

All of which matters and things will be found of record in this honorable court, reference thereunto being duly had.

That these are the acts and suits of the defendants referred to and set out in the bill of complaint in this present action.

And these defendants allege that in said actings and proceedings they have acted in accordance with law and to protect their legal rights, and that no cause for injunction in consequence thereof has accrued to the plaintiffs.

And, on information and belief, they also allege that the relators herein have brought this present action in order to
75 avoid if possible the said proceedings and orders against them in this honorable court, and to prevent these defendants from obtaining the relief and redress herein to which they are justly entitled.

And these defendants deny that there is any other matter, cause, or thing in the complainants' said bill of complaint contained necessary or material for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct; and, having fully answered, humbly pray to be hence dismissed with their reasonable costs and charges.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Solicitors for the Defendants.

STATE OF SOUTH CAROLINA,
County of Charleston, } *ss:*

Before me, D. B. Henderson, a notary public of South Carolina in and for the county of Charleston, personally appeared Robert Adger, who, being duly sworn, says that he is a member of the joint stock company or mining partnership known as The Coosaw Mining Company, the defendants in this action; that he is the general manager of that company and has been their general manager since their organization and is thoroughly acquainted with their business and affairs; that the foregoing answer is true so far as the matters and facts therein stated are of his own knowledge, and so far as they are stated upon information and belief he believes them to be true.

ROBERT ADGER.

Sworn to and subscribed before me this 4th day of May, A. D. 1891.

D. B. HENDERSON,
Notary Public.

[SEAL.]

EXHIBIT "A."

Articles of agreement made and entered into this second day of May, in the year of our Lord one thousand eight hundred and seventy, by and between all the parties who, at the date or time of making the same or at any time hereafter, shall subscribe the same :

76 1. The subscribers hereto agree to form among themselves and with such others as shall from time to time become subscribers hereto an association for the purpose of digging, mining, and removing from the bed of the Coosaw river the phosphate rocks and phosphatic deposits therein and to prepare the same for market in such manner as may be most convenient and marketable, which association shall be known as "The Coosaw Mining Company." Their principal office or place of business shall be established as near to the locality of their mining operations as a suitable situation can be obtained for the same, but an agency shall be fixed at Charleston, and there all meetings shall be held.

2. The whole number of shares to be subscribed for is fixed hereby at the number of twelve hundred and fifty, each of which shall be entitled to one vote in all meetings of the shareholders hereinafter provided for and each of which shall be chargeable with an equal $\frac{1}{1250}$th part or share of the cost of outfitting, working, and managing the said mining business, and shall be entitled to have and receive the same share of the clear issues of the said adventure, and the holder thereof be the owner of one equal $\frac{1}{1250}$th share of all the rights and properties belonging to the said association.

3. Each of the subscribers hereto agrees to pay upon each share held by him, as the same shall be called for by the managers hereinafter to be provided for, a sum not exceeding one hundred dollars to and for the purposes and objects of this association, and further agrees to take, receive, and be charged with the number of shares set opposite his name at the foot hereof.

4. The business and affairs of this association shall be managed and conducted by a board of managers to be composed of five members of the association, of whom one shall be the executive officer and the chief manager of the association, whose signature or signature and seal, as the case may require, shall subject and bind all the means, funds, and property of the association to such contracts, promises, and agreements as may be signed or sealed by him, so far only, however, and for such amounts as the subscribers hereto agree to pay upon their respective shares and the managers shall be authorized to call for and no further, and no other person shall have the right, power, or authority to bind the said association but the chief manager for the time being, who shall receive for his services such salary per annum as the board of managers shall fix from time to time until the same be altered at an annual meeting.

5. The said board of managers and chief manager shall be elected at the regular annual meeting to be held on the second Tues-

77 day of May in each and every year during the existence of

this association after the first meeting to be held at Charleston, a majority of the whole votes being necessary to a choice in the first instance, and thereafter either by a majority of the whole number of shares or of two-thirds of the whole number present or represented at said meeting, and in case of failure to elect others the old board shall remain in office until there be an election.

6. The said board of managers shall have the appointment and employment, through their chief manager, of all persons they may consider necessary to carry on the work and business, and give them such designations and salaries or pay for their services as the said board shall fix from time to time.

7. The said board of managers shall also cause proper accounts and books of account to be kept, not only of the cash and stock, but of the different expenditures and receipts, properly classified, so as at all times to exhibit the state and condition of the affairs of the association, and also to keep an accurate journal of all their proceedings as a board.

8. The said board shall submit to the annual meeting of the association or oftener such statements as will clearly show the profits or the losses of the preceding year, and declare the dividends which can be paid, if any, subject to the action and determination of the meeting, and shall recommend what shall be done in case of loss.

9. That certificates of the number of shares to which each associate is entitled at the date of the execution of these articles shall be given to each associate, signed by the chief manager, whereupon shall be printed the form of transfer to be prescribed by the board of managers.

10. Every holder of such certificate shall have the right to sell any part or the whole of his shares to any other person or persons, and, upon such sale, such certificate shall be surrendered and a new one or new certificates issued, so as to represent the true number of shares held by each holder of a certificate, and the party purchasing and accepting a certificate shall sign his name to these articles and shall be bound from thenceforth in precisely the same manner to the observance of the same and for all acts previously done as if he had been an original party to these articles, and also shall be bound for just such part of all contracts then existing and entitled to just such share and part of all stock and rights and property then belonging to the association and of all profits thence accruing, so long as he shall hold his said certificate, as if he had been an original party to the *the* said association; and the seller who has surrendered his said certificate shall be discharged of the same share of liability and possess no more than such share of the stock, rights, and property, and thereafter be entitled to no more of the profits than shall be indicated by his new certificate, if he retains any portion, or, if he retains no share, then all his rights and interests in the said association shall cease and determine altogether; and in case of the death of any one holding a certificate his interest thenceforward shall be represented by his executors and administrators, who shall produce to the board of managers certificates of

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their appointment and office, and, to signify assent thereto, subscribe these articles as such executor or administrator.

11. This association shall continue, unless sooner dissolved by a vote of three-fourths of the whole number of shares, for the time or term of forty-three years from the date of these articles and so much longer as may be necessary to wind up all its affairs, not exceeding one year; but nothing in this clause shall prevent this association from changing the character of its organization by forming itself into an incorporation or from winding up whenever it shall be decided to be judicious by a like concurrence of three-fourths of the shares of votes.

12. That besides the annual meeting hereinbefore provided for monthly meetings shall be held on the second Tuesday in each month, and also special meetings may be held at the call of majority of the board or of the chief manager alone, or, if they refuse to call such meeting when requested, then at the call of any number of the members of the association who may hold one-fourth of the whole number of shares. At all meetings a majority of the whole number of shares shall be necessary to form a quorum, and a like majority of all shares shall be necessary to determine every question, and the decision of such questions shall bind all the associates, present or absent. Due notice shall be given to each associate of every meeting of the association, whether annual or special, but there need be no notice given of the monthly meetings unless the managers have something special to submit to the shareholders at such meeting.

13. The managers shall have power to assess and call for such sum or sums on each share, not exceeding in the aggregate one hundred dollars per share, as shall be needed from time to time, which said sums shall be paid by each shareholder within ten days after notice given to him in writing by the chief manager, by mail, as such subscriber shall direct; and if no direction be given,
79 then by letter to him dropped in the Charleston post office, and in case said assessment shall not be paid within that time, then the shares of such subscriber, or so many of them as may be necessary to raise the assessment, may be sold by the managers at open auction, among the subscribers only, due notice being first given to all the subscribers of the time and place of the sale.

14. In case of the temporary absence or inability of the chief manager he may appoint some other member of the association to act in his stead, and in case of his death, resignation, or permanent disability his place shall be filled by a majority of the shares at a meeting to be held as soon as reasonable notice can be given by the managers, and in case of a vacancy among the other members of the board his place shall be filled by the remaining members until the next election.

15. Any member may appoint a proxy, with full power to represent him in all respects, but such proxy must be a member, and each non-resident of the city of Charleston shall have a proxy resident in the said city upon whom notices can be served.

16. That any modification or alteration of these articles, as ex-

perience may suggest, may be made by the concurrent vote of three-fourths of the whole number of shares, and such alteration or modification shall be binding on all the owners of shares, save only and except that the amount to be called for on each share shall never be increased.

In testimony whereof we have hereunto subscribed our names, with the number of shares for which we subscribe opposite to each, the day and year first above written.

EXHIBIT "B."

STATE OF SOUTH CAROLINA, }
Charleston County. }

Know all men by these presents that we, The Coosaw Mining Company and Robert Adger, O. A. Bowen, H. K. Silliman, and A. M. Adger, are held and firmly bound unto Solomon L. Hoge, comptroller general of the State of South Carolina, in the penal sum of fifty thousand dollars ($50,000) to be paid to the said Solomon L. Hoge, comptroller general of the State of South Carolina; to which payment, well and truly to be made and done, we bind ourselves and each and every of our successors and assigns, jointly and severally, firmly by these presents.

80 Sealed with our seals. Dated at Charleston the fifteenth day of May, anno Domini one thousand eight hundred and seventy-three, and in the ninety-seventh year of the sovereignty and Independence of the United States of America.

The condition of the above obligation is such that whereas the State of South Carolina, by an act entitled "An act to grant to certain persons therein named and their associates the rights to dig and mine in the beds of the navigable streams and waters of the State of South Carolina for phosphate rock and phosphatic deposits," passed the first day of March, A. D. 1870, did give and grant to George W. Williams, Charles C. Coe, James H. Taylor, Joseph R. Robertson, Edwin Platt, Wm. L. Bradley, James Bridge, Jr., William Birnie, and such other persons as they might associate with them the right to dig, mine, and remove for the full term of twenty-one years, from the beds of the navigable streams and waters within the jurisdiction of the State of South Carolina, the phosphate rock and phosphatic deposits, upon certain terms and conditions in said act mentioned;

And whereas said grantees named and others referred to in said grant as associates have associated themselves together under the laws of the State under the name and style of "The Marine and River Phosphate Mining and Manufacturing Company of South Carolina;"

And whereas said grantees have also associated with them in the privileges of said grant and subject to its liabilities George S. Brown, Robert Adger, Orsamus A. Bowen, David Jennings, Henry K. Silliman, and James B. Campbell, who with others now style themselves "the Coosaw Mining Company," but are not the less associates under

said act referred to therein, although restricted in their mining operations to the waters of the Coosaw river:

Now, if the said Coosaw Mining Company (being associates named and referred to in the act aforesaid) shall make true and faithful returns to the comptroller general of the number of tons of phosphate rocks and phosphatic deposits dug, mined, and removed by them from the beds of the navigable streams and waters of the State, and shall punctually pay to the State treasurer on the first day of October, A. D. 1873, one dollar per ton for every ton of phosphate rocks and phosphatic deposits by them dug, mined, and removed from the beds of the navigable streams and waters of the State
81 during the year preceding, then this obligation shall be null and void; otherwise the same shall be and remain in full force and virtue.

COOSAW MINING COMPANY, [L. S.]
By ROBERT ADGER, *Chief Manager.*
ROBERT ADGER. [L. S.]
O. A. BOWEN. [L. S.]
HENRY K. SILLIMAN. [L. S.]
A. M. ADGER. [L. S.]

Signed, sealed, and delivered in the presence of—
DAVID LOPEZ.

EXHIBIT "C."

STATE OF SOUTH CAROLINA, }
Charleston County. }

Know all men by these presents that we, the Coosaw Mining Company, per Robert Adger, chief manager, are held and firmly bound unto the State of South Carolina in the penal sum of fifty thousand dollars ($50,000), to be paid to the said State of South Carolina; to which payment, well and truly to be made and done, we bind ourselves and each and every of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Charleston the 31st day of March, anno Domini one thousand eight hundred and seventy-six, and in the one hundredth year of the sovereignty and Independence of the United States of America.

The condition of the above-written bond or obligation is such that if the above-bound Coosaw Mining Company shall make to the comptroller general of the State of South Carolina true and faithful returns of the number of tons of phosphate rocks and phosphatic deposits they have dug, mined, and removed and shipped or otherwise sent to market at the end of every month, and shall punctually pay to the State treasurer the royalty provided by law to be paid thereon—that is to say, one dollar for each ton thereof—at the end of every quarter of three months, the first quarter to commence to run on the first day of March, in the present year, according to the true intent and meaning of an act of the General Assembly entitled

"An act to settle definitely the periods at which returns shall be made of the phosphate rocks and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina and the royalty shall be paid thereon, and
82 also to fix the terms on which this act may be accepted by the parties named therein," approved by the governor on the twenty-eighth day of this present month of March, under the provisions of which act this bond is given and accepted, then this obligation shall be null and void; otherwise the same shall remain and be in full force.

THE COOSAW MINING CO., [L. S.]
By ROBERT ADGER, *Chief Manager.*
ROBERT ADGER. [L. S.]
O. A. BOWEN. [L. S.]
HENRY K. SILLIMAN. [L. S.]
A. M. ADGER. [L. S.]

Signed, sealed, and delivered in presence of—
H. D. LESESNE, JR.

EXHIBIT "D."

Board of phosphate commissioners, State of South Carolina.

COLUMBIA, *February 24th*, 1891.

By instructions of the board of phosphate commissioners I beg leave to call the attention of all persons interested to the following:

1. That any or all exclusive rights to mine phosphate rock from the beds of the navigable streams of this State and in the marshes thereof shall and will cease after the first day of March, 1891.

2. By the 70th section of the General Statutes of this State "the said license shall be for the term of one year, remandable at the pleasure of the board of phosphate commissioners."

The board of phosphate commissioners will meet in Beaufort, S. C., on the second day of March, A. D. 1891, for the purpose of considering applications for license to mine phosphates from the beds of the navigable streams of the State and the marshes thereof. If any one desires to mine the same the application must be submitted to the said board.

3. All applications must state the name and address of applicant, the territory for which he desires the license, the character of the plant to be used in mining, viz., steam-dredges or hand appliances, such as tongs, etc. The applicant must present the
83 bond required by section 68 of the General Statutes of this State, viz: "As a condition attendant to the right to dig, mine, and remove the said rock and deposits hereby granted each person or company shall enter into bond, with security, in the penal sum of $5,000, conditioned for the making of true and faithful returns to the comptroller general of the number of tons of phosphate rock and phosphatic deposits so dug or mined at the end of every month and the punctual payment to the State treasurer of

the royalty hereinbefore provided at the end of every quarter or three months as aforesaid, which bond and sureties therein shall be subject to the approval now required for the bonds of the State officers."

After the second day of March, 1891, applications for licenses will be considered at Columbia, S. C.

4. That, as a condition precedent to the granting of such license to mine in the Coosaw river territory and to remove phosphate rock and phosphatic deposits therefrom, the board of phosphate commissioners will require every applicant for rock license to include in the bond executed by him, as hereinbefore recited, an agreement that he will so dig and mine under this license as aforesaid as the agent of the State of South Carolina, and that each ton of phosphate rock and phosphatic deposit the product of such mining operations shall be deemed the property of the State until the party who shall receive a license shall have paid thereon a royalty, to be fixed by said commission, at not exceeding $2 per ton on each ton of phosphate rock or phosphatic deposit dug, mined, and removed, provided six months' notice shall be given before raising royalty above one dollar.

5. Enclosed please find bond in proper form, which must be executed by the applicant and at least two sureties, who must each take the oath printed on the bond before some officer authorized to administer oaths.

7. The bond must in all cases accompany the application or the latter will not be considered.

8. It shall be as a condition precedent to the granting of a license to dig, mine, or remove phosphate rock or phosphatic deposits that any person, corporation, company, or firm applying for such license shall subscribe to the rules and regulations adopted by this board on the 24th day of February, A. D. 1891, and shall bind himself or themselves faithfully to observe, obey, and comply with the same and submit to the penalty and forfeitures therein prescribed whenever the same or any of them be by him or them violated.

Done by order of the board.

B. R. TILLMAN,
Chairman of the Board.

84 XI.

Notice of Motion to Vacate Temporary Injunction, &c.

To Hon. Y. J. Pope, attorney general of South Carolina, attorney for the plaintiffs herein:

Please take notice that on Friday, the eighth day of May, current, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, the undersigned will, on behalf of the defendants herein, move before this honorable court, at the court-house, in Charleston, So. Ca., on the return heretofore filed by the defendants and on all the pleadings

in the cause, to vacate the temporary injunction, &c., and for such further relief as may be just and proper in the premises.

4th May, 1891.

McCRADY SONS & BACOT.
SMYTHE & LEE.

(Served 4th May, 1891, and filed 8th May, 1891.)

XII.

Special Appearance and Exceptions of Plaintiffs.

And now comes The State of South Carolina, plaintiff above named, by the Hon. Y. J. Pope, attorney general for the State, and gives this court to understand and be informed that it doth appear herein only so far as may be necessary for the protection of the interests of the said State, and by protestation, not confessing or admitting in any way soever the jurisdiction of this court in the above-entitled cause or over the said plaintiff, this appearance being made in consequence of his honor Judge Simonton's decree, heretofore filed herein, asserting jurisdiction of this cause, and for the protection of the plaintiffs' interests and without prejudice to the said plaintiffs' right to move to remand the said cause and to except
85 to the said decree and to any future decree of this court refusing to remand or asserting jurisdiction herein, and the said plaintiff doth hereby except and save the said point as to the jurisdiction on the record for the purpose of reviewing the same on any appeal had herein hereafter.

May 8th, 1891.

Y. J. POPE,
Attorney General of State of So. Ca., Plaintiffs' Attorney.

(Filed 8th May, 1891.)

XIII.

Exceptions and Petition to Remand by Plaintiffs.

To the judges of the United States circuit court for the district of South Carolina:

The State of South Carolina, plaintiff above mentioned, hereby respectfully excepts to this court taking or asserting any jurisdiction over this cause, and prays that the same be remanded to the court of common pleas for the county of Beaufort upon the following grounds:

1. That the said court of common pleas for Beaufort county has upon the inspection of the bond and petition for removal adjudged them to be insufficient as matter of law and as representing no cause for removal, and has retained the cause and appointed a receiver of the subject-matter of the same, and is thereby in possession thereof.

2. That this court cannot take jurisdiction until the petition and bond have been presented to and acted on by the court of common

pleas for Beaufort county, and that if the order heretofore made by the judge of that court at chambers is not a sufficient action upon said petition and bond, then that this court can take no action asserting jurisdiction herein until said petition and bond shall have been presented to and acted upon by said court in term time.

3. That when a bond and petition for removal are adjudged by a State court to be insufficient as matter of law to authorize a
86 removal, then that this court should not review that finding, but wait until the error (if any) of the State court so holding be corrected on appeal.

4. That the complaint herein taken alone shows no cause for removal, in that there appears therein no question, cause, or controversy arising under the Constitution and laws of the United States.

5. That the record herein, including the petition for removal, shows no cause for removal, in that there appears in the same no question, cause, or controversy arising under the Constitution or laws of the United States.

6. That the Federal questions attempted to be set up in the petition for removal are not such as to render the cause removable, but only such as can be corrected on final appeal to the United States Supreme Court if the State court fail to give due effect thereto.

May 8th, 1891.

Y. J. POPE,
Attorney General of South Carolina, Plaintiffs' Attorney.

(Filed 8th May, 1891.)

87 XIV.

Subpœna.

The United States of America to the marshal of the district of South Carolina, Greeting:

We command you to summon Edward McCrady, Jr., A. T. Smythe, A. M. Lee, Louis de B. McCrady, T. W. Bacot, Moses E. Lopez, and J. Ellison Adger, if they shall be found in your district, to be and appear before the judges of the circuit court of the United States for the district of South Carolina, at the April term, 1891, holden at Charleston, in the district aforesaid, on the 3rd day of June, 1891, at 10 a. m., to testify on behalf of the complainants, and to bring with them and then and there produce the papers set out in the list hereto annexed in the cause wherein The State of South Carolina is plaintiff and The Coosaw Mining Company is defendant, and this you will in nowise omit, under penalty of the law in that case made and provided; and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme

Court of the United States of America, at Charleston, this 30th day of May, 1891.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Y. J. POPE,
Attorney General of South Carolina, Complainants' Solicitor.

Filed 30th May, 1891.

88 *Marshal's Return.*

Wm. Reed, deputy U. S. marshal, sworn, says that on May 30th, 1891, in the city of Charleston, S. C., he personally served all the within-named witnesses with subtickets of this writ except Moses E. Lopez, and that he served him by leaving a subticket of this writ with his wife at his residence, on Rutledge avenue, at the head of Bee St.

WILLIAM REED.

Sworn to and subscribed before me this 30th May, A. D. 1891.

J. WESLEY SMITH,
U. S. Comm'r.

89 XV.

Replication.

The replication of The State of South Carolina, complainant, to the answer of The Coosaw Mining Company, defendants.

The State of South Carolina, repliant, saving and reserving unto the said State now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto saith that the said State will aver, maintain, and prove the bill of complaint herein to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or *avowed*, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by said bill of complaint has been already prayed.

Y. J. POPE,
Attorney General of S. C., Complainant's Solicitor.

Filed June 1st, 1891.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

90 XVI.

Notice.

To Messrs. McCrady, Sons & Bacot and Smythe & Lee, solicitors for the defendant:

Take notice that you are hereby required and notified to produce and exhibit before the court at the hearing of the motion for a temporary injunction to be had on Wednesday, the 3rd day of June, 1891, at 10 a. m., the following papers, to wit:

1. The agreement between the grantees under the act of 1870, dated the 15th day of March, 1870, whereby it was agreed that George S. Brown and his associates should have, possess, and occupy the Coosaw river, said agreement being the one referred to in article 14th of the answer herein.

2. The opinion of Edward McCrady, Sr., copies of which were distributed to the members of the legislature, as referred to in the 16th article of said answer.

Charleston, S. C., May 30th, 1891.

Y. J. POPE,
Attorney General of So. Ca., Complainant's Solicitor.

Filed June 2nd, 1891.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Service of the within notice acknowledged this 30th day of May, 1891.

McCRADY, SONS & BACOT.
SMYTHE & LEE.

91 XVII.

Notice of Motion.

To Messrs. McCrady, Sons & Bacot, Smythe & Lee, solicitors for the defendant:

Take notice that the undersigned will move, before the United States circuit court, on Wednesday next, 3rd June, 1891, at 10 a. m., or as soon thereafter as counsel can be heard upon the papers in the cause and such additional papers or affidavits as may be filed herein, that a temporary injunction as prayed in the bill herein do issue, and that the restraining order granted by his honor Judge Aldrich on the 21st March ulto. be continued—

This notice being given and the motion being made without prejudice to the motion to remand and subject to the exceptions to the jurisdiction already made.

Y. J. POPE,
Attorney General of So. Ca., Complainant's Solicitor.

Charleston, S. C., 30th May, 1891.

Filed 2nd June, 1891.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Service of the within notice acknowledged this 30th day of May, 1891.

McCRADY, SONS & BACOT.
SMYTHE & LEE.

92 XVIII.

Affidavit of Wm. J. Gayer.

Personally appeared before me Wm. J. Gayer, Esq., and made oath that he was intimately acquainted with the later James B. Campbell, formerly counsel for the Coosaw Mining Company.

That the said James B. Campbell himself personally informed deponent that he had prepared the draft of the act passed by the legislature in 1876 to give the Coosaw Mining Company the perpetual right to mine in the Coosaw river.

WM. J. GAYER.

Sworn to before me this 23rd May, 1891.

JULIAN MITCHELL, JR.
[SEAL.] *Notary Public.*

Filed 3rd June, 1891.

J. E. MAGOOD,
C. C. C. U. S., Dist. S. C.

D'f'ts objected to the introduction of the above paper as evidence at the hearing.

CHARLES H. SIMONTON,
Dist. Judge.

93 XIX.

Notice to Fix Bond for Costs.

To Honorable Y. J. Pope, attorney general, complainant's solicitor:

Take notice that the undersigned will move, before the United States circuit court, on Wednesday next, the third of June, 1891, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, for an order fixing the proper security for costs to be given by the complainants in this action.

McCRADY, SONS & BACOT,
SMYTHE & LEE, *Def'd't's Sol'l'rs.*

Filed June 4th, 1891.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Due service by a copy thereof of the within notice is hereby admitted 1st June, 1891.

Y. J. POPE,
Attorney General, Compl't's Sol'r.

94 XX.

Affidavit of H. A. M. Smith, with Exhibit, "Opinion of Ed. McCrady."

Personally appeared before me Henry A. M. Smith and made oath that the papers annexed hereto is the opinion of Edward McCrady, Sr., referred to in the 16th article of the answer of the defendant herein.

HENRY A. M. SMITH.

Sworn to before me this 4th day of June, A. D. 1891.

C. J. MURPHY,
Dep'ty C. C. C. U. S., Dist. S. C.

95 *Opinion of Edward McCrady for the Coosaw Mining Company.*

Opinion upon the demand made by the comptroller general of the State in a communication dated 2nd October last, 1875, which is in these words:

"I shall insist on the payment for every ton 'dug, mined, or removed,' as the statute requires, and not for the amount exported from the State, which seems to be the basis on which you make your payments."

The basis upon which all previous payments of royalty have been made, referred to in the above extract from the comptroller general's communication, was that which was taken to be fully authorized by the full meaning of the statute upon full consideration of the comptroller general's predecessor, at that time representing the State in this business, and of the grantees under the same statute soon after its passage and from thence conformed to up to the present time. The question, therefore, is whether this construction made in the same year in which the act was passed (1870) and ever since supposed to be the true construction was an error which must be corrected and overruled. Such a basis, resting upon a construction honestly reached and continuously acted upon for so many years, certainly should not be lightly changed upon mere doubt of the original accuracy of such a construction, but only upon absolute certainty of misconstruction and necessity for the change combined.

96 The change demanded by the comptroller general would give to the State treasury of this year the royalty both on that which was on deposit on the 1st October, 1874 (already paid), and that which was on deposit on October last, 1875.

This last, according to the previous mode of settlement, would not be paid till 1st October, 1873, and the object of the present demand is to anticipate this payment by a year. The only difference to the grantees, beside the inconvenience of having to raise this amount before they have received it, is the interest from this time to first of October, 1876. The annual revenue of the State for the next year would, however, probably be reduced, not only by the amount now demanded and paid on the deposit on last October, but also by a diminution of the next year's deposit, and it is natural to suppose the grantees and miners would endeavor to make this deposit next

year as small as possible to avoid having to pay royalty so long in advance.

Then the change must lead, not only to a complication of the accounts to be kept, but also to a most unsatisfactory mode of determining the quantity on which the royalty is payable, as that can only be done by a rough estimate, as the handling and weighing of the deposits is expensive and no one is authorized by the State to attend to the weighing, and the quantity could only be *guessed* at. If the miners made too large an estimate and paid for it they could not be certain of getting it back, and if they made it too small this would bring upon them the suspicion of unfairness. The present mode secures accurate measurement, because the miners and the shipmaster have opposite interests in fixing the quantity to make them watchful on both sides, and the bills of lading and cus-
97 tom-house records afford certain information and proof to the State of what the miners have shipped.

The most serious difficulty of all is that what may happen to be deposited on the first day of October may far exceed that which can ever be sent to market, and it is this which will assist us to a true construction of the act. A marketable phosphate must contain a certain percentage (say 55 per cent.) of phosphate of lime. That is the standard fixed everywhere, and certain processes or careful analysis must be resorted to to ascertain this percentage in every ton before the miner can risk the sending it to market. The phosphate rock or phosphatic deposit taken from the beds of the navigable streams must be worked up to this standard before it is merchantable or fit to be sent to market. The royalty to be paid to the State under this grant is a very heavy percentage of the whole value of these phosphates, even when they have been brought up to this standard—not less than from one-sixth to one-seventh of their value or what these phosphates can be sold for—whereas miners in Cornwall, Devonshire, and other places in England who take up portions of the waste or commons belonging to the proprietors of the land to search for tin ore, which by ancient custom they have done and still may do, pay to these proprietors of the soil for this privilege only from one-tenth to one-fifteenth of the ore raised, the percentage varying in different places within these limits.

The words used in the act granting the right to dig and mine for these phosphates, to fix the liability, are very few, frequently re-
peated, and always precisely in the same order—thus, "dug,
98 mined, and removed." Each word has a certain definite meaning in relation to the subject-matter, and the copulative conjunction "and" requires the combination of *of* all three operations in order to make the grantees liable to pay and the State entitled to demand the royalty. The comptroller general has either read the act inaccurately, which is certainly suggested by the words he says are in the statute and puts into his communication between inverted commas, or he boldly and dogmatically determines, without offering a reason, that the word "and" in the statute must be construed and be read "or." The two words are both very small, but in the construction of the sentence all important, and it is perfectly

manifest that the comptroller general has read the statute incorrectly and therefore quotes it incorrectly, or clearly says that as the words are written in the statute it cannot serve his purpose in its natural interpretation. It is for him to sustain his reading, as the published statutes and acts of assembly read just as we have quoted them, or, if we quote correctly, for him to sustain his construction.

The question is, Is there any reason or necessity for changing "and" into "or"? This is sometimes done in the construction of wills to carry out the intention of the testator, but we do not know of a solitary case in which the word "and" in a statute or a contract has ever been construed into "or" to fix a liability. Sometimes adverbs may be indifferently coupled by the use of either "and" or "or" where they mean the same or nearly the same thing, but that these two little monosyllables can be indifferently used
99 in statutes to connect verbs meaning action and different kinds of action and to fix and determine liabilities seems to be quite as unreasonable as unknown. Beyond all question, however, in order to warrant such a change, it must be shown that the necessity to make some meaning and good sense out of the other words used absolutely requires it, and it would seem to be sufficient to say that until this necessity is proved the word "or" cannot be substituted for the word "and." This short answer, however, is not what the Coosaw Company require. They desire to have our opinion positively as to what the law, fully considered, requires of them, and we therefore will present the grounds upon which we conceive the first construction given to the provisions of the statute to be perfectly correct.

The title of the act is "An act to grant to certain persons therein named and their associates the right to dig and mine in the beds of the navigable streams and waters of the State of South Carolina for phosphate rocks and phosphatic deposits." Our constitution requires that the subject of every act shall be expressed in its title, and the title therefore may be used to construe the act. Here the subject is distinctly and accurately expressed in the title, namely, a grant to some persons of the right to dig and mine in the beds of the navigable streams and waters of the State for phosphate rocks and phosphatic deposits. It was intended to give the grantees the right to search for phosphates everywhere in the beds of the navigable waters of the State. To catch fish of every kind was a common right, even where the fish by their habits required digging in the bottom of the navigable waters, but to dig and mine for
100 a marketable substance composing the beds of the navigable waters was not of common right, and that had to be granted. The words to convey the meaning of the process authorized are only dig and mine, and they do not effectually convey the intent and object of the act. If no other words than these had been used in the enacting clauses of the act they would have been altogether sufficient. Search for the material to be mined was necessary, and therefore the right to dig in the beds of the navigable waters was given everywhere. There were no other way in which it could be ascertained that there were any phosphates in the beds of the navi-

gable waters which could be made marketable but by digging them up. This search by digging was a serious part of the business and had to be carefully, judiciously, and skillfully conducted to determine where mining could be ventured upon. A bad choice of location for mining operations might involve large expense without profit and result in ruin. Liberty and right was therefore to be given to the grantees to dig up the beds of the navigable waters of the State everywhere and to make their explorations and determine the sites for their operations.

When the search had been successfully made and the site fixed upon, the next operation was to mine these phosphates. The meaning of this word "mine" must be fully understood to form any correct opinion upon the construction of the act. The word includes the whole process of removing the material sought for from the bed in which it is found—bringing it to the surface, separating it from all foreign material with which it is associated or which ad-
101 heres to it—and then, after it has been entirely separated and thus produced from the place of its formation, it must be subjected to various processes to bring it into a condition fit for commerce; and then a way for it to reach a market must be found. The expressive term used in the book is, "to win the ore or material." It is said by the best elementary writers of the law of mining that, "as a general rule, the bare right to work mines will be accompanied with the right to use so much of the surface as is strictly necessary and reasonable. He (the miner) will be entitled to erect all adequate modern machinery, as steam-engines, for draining the mines and for drawing the minerals from deeper workings." This, even where the right might have been acquired before steam was used. In one case a right to mine was allowed to include two and a half acres of the surface, even in England, with buildings, warehouses, and workshops, with an engine of fifty-horse power. "To effect his object (that is, to bring the materials to its first marketable state, but not to manufacture it) he may avail himself, subject often to the concurrent right of other owners, of the elements and materials afforded by the land in which his mines are found. Thus he may use water for cleansing ores and for machinery, make channels, reservoirs, and make and repair roads." The objects of miners and mining are to get the material to be mined into a proper state and condition for market and to a market, and the grant to mine the material carries with it everything necessary to both these objects; and no material can — said to be mined until it is brought into a form in which it can be sent to and be sold in the proper and best market.

102 We are now prepared to consider the construction of the words in the enacting clauses, and in no other way could we be prepared for this that what has been said as briefly as we could; for there is no canon for the construction of the words of a statute or any other writing more agreeable to common sense or more invariably and universally recognized than that the terms used are always to be understood as having a regard to the subject-matter;

for that will always be in the eye of the writer or framer of the law and all his expressions direct- to that end.

The words of the statute in reference to the payment of the royalty are to be found in the 2nd and 3rd sections of the act. They are:

SEC. 2ND. That this gift and grant is made upon the express condition, that the said grantees shall pay to the State of South Carolina, the sum of one dollar per ton, for every ton of phosphate rock and phosphatic deposits, dug, mined and removed from the said navigable waters of the State.

SEC. 3. The grantees are required to file in the office of the State auditor, a bond for $50,000 "conditioned that said grantees, and their associates, shall make true and faithful returns to said State auditor, annually, on or before the first day of October, and oftener if required by the State auditor, of the number of tons of phosphate rock and phosphatic deposits, dug, mined and removed by them, from the beds of the navigable streams and waters of the State, and shall punctually pay to the State treasurer, annually on the first day of October, one dollar per ton, for every ton of phosphate rock and phosphatic deposits, by them dug, mined and removed
103 from the beds of the navigable streams & waters of the State, during the year preceding."

Did these provisions in the enacting clauses of this statute warrant the officers who represented the State in making the arangement for ascertaining the amount of royalty to be paid annually by the Coosaw Company? These clauses, while they fix the rate of royalty, make no provisions whatever for ascertaining the quantity for which royalty was to be paid. Some mode for determining the number of tons to be paid for was to be adopted, and as that was left entirely open by the legislature, it had to be made by the good sense of the representatives of the State and the grantees. Under all the circumstances, perhaps no better mode than that which was adopted could have been devised.

The grant was to dig and mine everywhere throughout the navigable waters of the State, without any restriction as to time and place. Operations might be carried on at the same time in every place where phosphates could be found. The greater the number of the operations, the better for the revenue of the State. Gov. Scott's chief objection to the grant was that it did not put the grantees under the necessity of commencing and prosecuting their operations with vigor.

The sites of these operations were primarily and greater part throughout to be upon the navigable waters of the State. To be navigable, waters must have depth, and these operations had to be carried on not in shallow but deep water; but there surely could not have been any expectation that the phosphates dug would be accumulated upon those deep waters, nor that all the processes
104 needed to prepare the raw material for a market must be carried on upon the navigable waters of the State. Of necessity the grantees must be allowed to deposit the material dug up, after it had been cleansed as far as could be upon these deep waters,

upon some convenient landing place, where the rest of the preparations to fit it for market could be carried on.

Thus material dug and partly mined must accumulate in deposit upon some proper place for storage, to be worked upon and prepared for and to be put upon its transit for market. These accumulations of materials yet unfit for market will generally if not invariably be greater in the beginning of October, as the summer season is the best time for the operations of digging out the beds of the rivers; but these accumulations of materials not thoroughly prepared cannot be considered or be said to be mined. They are dug and brought to a place of deposit for preparation only as yet, and not yet thoroughly mined.

It so happens that the Coosaw Company was able very soon after its operations were commenced to make arrangements for sending their thoroughly prepared phosphates to a foreign market and have never sent them anywhere else; so that whatever is ready for market is put on board ship for a foreign market as soon as a ship arrives at the proper anchorage. The quantity ready for market is generally not much more than what one or two vessels can take, and as soon as room is made (by shipping) to carry on the operations for fitting the material for market the unprepared deposit is immediately put in process of preparation, so that the number of tons shipped may be the whole and is usually very nearly the whole amount prepared or completely mined, according to the true
105 meaning of the word. It was under these circumstances that the present mode of settlement with the State was adopted, and we do not see that any arrangement could have been more fairly or justly made than was made.

The place where the company carry on their operations is away from all marts and only accessible through Beaufort by private communications or conveyances, and the State would have to submit to the statements of the company implicitly (which would be inconsistent with the language of the statute), unless some such method as this had been devised for the settlement of the royalty of the phosphates dug at this particular location.

The real question is, Did the representative of the State who made the arrangement exceed his authority? If he did not, there is no reason to disturb it. The whole doubt is raised by the misreading or misconstruction of the words of the statute, and in our opinion the arrangement was not only judicious and authorized, but was the fittest, fullest, and fairest compliance with the provisions of the statute, as we will attempt to show.

Each one of the three words as they occur in the act, "dug, mined, and removed," has a certain and definite meaning. It has already been shown what the meaning of dug and mined is. Can it be said that removed has no meaning? If it has none, then we have already expounded the construction of the other two words. If it has any meaning it must be something different from either of the other two; and what is that meaning? Its meaning, to be different, while we retain the true reading of the act with the conjunctive "and," must be to add something to what is already ex-

pressed in the two preceeding words—that is, to require some
106 further action to complete the liability; and this is precisely the meaning which the subject-matter of the grant requires—that is, to set the phosphates dug and mined and fully prepared for commerce upon their transit to a market. We say to set them upon their transit to market, whereever that market may be—whether shipped to a foreign port, to another port in the United States, or to another place within this State with the expectation of selling them there. Whether already sold or not is of no consequence; the only thing necessary to fix this liability is that the phosphates, completely ready for a market, are put in transit to some other place for sale. This construction gives to every one of the words a distinct meaning, perfectly intelligible when applied to the subject-matter of the statute, and entirely consistent with the purposes of the grant. And it is said to be "a safe method of interpreting statutes to give effect to the particular words of the enacting clauses. for when the legislature in the same sentence uses different words the courts of law will presume that they were used in order to express different ideas." This is only the rule of common sense applied even to ordinary writings, or even common speaking.

And this brings us at last to a point out of the error of the comptroller-general's construction, if it be not an inaccuracy, in reading the statute. He reads or construes it "dug, mined, or removed," so that whatever was dug from the beds of the navigable rivers, whatever was mined, or whatever was removed from them, must pay royalty. To give a strict construction to such a reading would
107 have made the grantees mining under this statute liable three times. When they dug a ton they were liable, and so when they mined a ton and when they removed a ton. At each several step the royalty became due. However preposterous this may seem, this is the inevitable construction of the words, if each word is to have effect in this sentence, and the only way to avoid such a construction is to make all the words together and each one severally mean the same thing. And what thing is that? Which word shall control and absorb the other two? This would be, indeed, a problem to be solved which would be far beyond our capacity; but, if forced to it, the only possible way would be to give that word most important to the subject-matter and purpose of the act the control over both the others, and that word is certainly mined, which would bring us back to nearly all our conclusions.

Perhaps it may be supposed that the juxtaposition of the words may give some countenance to the construction put upon them by the comptroller general, "dug, mined, and removed by them (grantees) from the beds of the navigable rivers," &c. A moment's reflection will show that upon all the rules of construction alluded to this could not be maintained. If every ton removed from the beds of the rivers be required to pay royalty, then surely digging them out of the beds was removal from the beds, and so was mining them, and thus if bare removal created the liability it was created when the ton was dug, although it should have been rejected as not worth working and thrown back again, or if it should have been

sunk again in some other place by accident before it reached
108 a landing. It is therefore perfectly manifest that to give such a construction to these words on account of their juxtaposition leads to an absurdity.

Nothing is more constantly recognized in construing written instruments, deeds, wills, or statutes than the necessity for transposing words or sentences or putting them in parenthesis, and this is frequently done by courts and judges. Let us read it thus: "One dollar per ton for every ton of phosphate rock and phosphatic deposits by them from the said navigable rivers and waters dug, mined, and removed." Every word is here and every word can have its proper meaning.

But the comptroller general says he found his claim upon your own reports made to the inspector of phosphates. We have two blanks for these reports before us, and these, taken together with the act of the General Assembly under which they are made, seem to settle the question against the claim of the comptroller general. We have shown that the true construction of the act makes removal the last act of the series to fix the liability of the miners, and that an act subsequent to two others which were necessary to fit and prepare the phosphate for market, and that the removal contemplated by the act was putting or setting the fully prepared stuff on its transit to a market. The only doubt was, Does removal mean any removal from the beds of the rivers? which we have shown leads to an absurdity, or to some other removal, such as we have said was intended—that is, a removal towards a market? The act to pro-
vide for the appointment of an inspector of phosphates and
109 to declare his duties gives this meaning to this word just as we have said it should be understood, and the 2nd and 3rd sections are framed upon this construction as that which was recognized at its passage, 1872.

SEC. 2. "That it shall be the duty of all companies or individuals, who are or may be authorized by law to dig, mine or excavate such phosphate rocks and phosphatic deposits, from the beds of the navigable streams within the jurisdiction of the State, to report to the inspector of phosphates, monthly, the quantity of such rock and deposit, dug, mined and excavated, and whether the same be on hand, awaiting removal, or if it has been removed, or is being moved, to furnish a copy of the bill or bills of lading, which reports shall be verified by the oath of the person making the same. And it shall be the duty of all captains of vessels and railroad officials, to furnish to the inspector of phosphates, duplicates of all bills of lading of all cargoes of such rock and deposit, with which their vessels or cars may be freighted, for export from this State, or transportation within this State. And to the end, that the said inspector of phosphates, may be enabled to verify the reports of the quantity of such rocks and deposits, which have been, or may be, dug, mined excavated and removed, he shall, at all times, have and be allowed free and uninterrupted access to all places where such rocks and deposits are dug, mined or excavated, and to all warehouses, or open or enclosed places, where such rocks or deposits are stored, and to all vessels,

railroad cars, or conveyances in or by which such rocks and deposits are being removed."

It is very difficult to read this section with full information about the mode of settlement adopted by the officers of the State and the grantees at the commencement and not conclude that this arrangement was in contemplation of the framers of the law, not only to provide a mode of settlement for the future, but to confirm that which had been already adopted and practice simply upon the judgment of the officers of the State and the grantees. A careful reading of the act also shows with what accuracy the two words "or" and "and" are used throughout. The manner in which we construe the word removed, as intended to be applied to setting the phosphates on their transit to a market, either without or within the State, is expressly justified. The report to the inspector is of "the quantity of such rock and deposit dug, mined, and excavated, and whether the same be on hand awaiting removal or if it has been removed or is being moved to furnish a copy of the bill or bills of lading.

Again, to enable the inspector to verify reports to him as to "quantity of such rocks and deposits which have been or may be dug, mined, excavated, and removed he shall at all times have and be allowed free and uninterrupted access to all places where such rocks and deposits are dug, mined, or excavated, and to all warehouses or open or enclosed places where such rocks and deposits are stored, and to all vessels, railroad cars, or conveyances in or by which such rocks and deposits are being removed." The doubt here is whether our construction has not been too liberal against the grantees when we have allowed that the first transit to a proper mart within the State, such as Charleston (where warehouses might be established for the purpose of storing and offering the phosphates for sale), be enough to charge the grantees with the royalty.

The 3rd section is equally, if not more explicit, to the same purpose, viz: "That the said inspector of phosphates shall report to the auditor of the State monthly the amount of phosphatic rock and phosphatic deposits which shall be ascertained to have been dug, mined, excavated, or removed from the navigable streams or waters of this State; by what company or person the same was dug, mined, excavated; by what vessel or other mode of transportation the same was removed, with such other particulars as may enable the State auditor correctly to ascertain whether the amounts due to the State have been paid, and, if not, who is accountable for the same." Here again we have the word removed distinguished from the words dug and mined and as altogether applicable to transportation of what was dug and mined, and it is to be observed that the word removed, thus plainly distinguished when it is first used, is in juxtaposition with the other words supposed to give it another interpretation, viz., "dug, mined, excavated, or removed from the navigable streams or waters of this State." Here where "or" is interposed between "dug, mined, excavated" and "removed" and made to *proceed* the words

'from the beds," &c., in the very next sentence it is distinguished and applied to transportation only.

Up to the passage of this act no means had been prescribed by the legislature for ascertaining the quantity upon which royalty should be paid, but a mode had been agreed upon between the officer having the matter in charge (the auditor, Mr. Tomlinson) and
112 the grantees which is so precisely what the law m[illegible]) and scribes as to lead directly to the conclusion that ow pre- which had been agreed on was approved, adopted, e the mode made the law. There is not a solitary provision of the acted, and ance or even inconsistent with the mode previously act at vari- and practiced, but there are many provisions to ena agreed upon officers to see that the amount removed was corre ble the State deed, all the provisions of [illegible] ions seem ctly fixed. In- mining whether the true [illegible] these two secti[illegible]n to aim at deter- the miners. The mo[illegible] amount transported was really reported by on deposit, as well as monthly returns of what was dug and mined and way, furnished the State with every particular which could be necessary to test the truth of the number of tons removed according to the true meaning of the original grant.

When the grant was made and the first royalty paid (1870, 1871) there was an auditor to whom reports were to be made and who would seem to have been the officer who alone could make the arrangements that *was* made about the mode of settlement for the royalty. The treasurer, who has been the same from the grant to the present time, had only to receive the royalty, not to settle the method of ascertaining the number of tons. He perhaps stood in a position where he might have objected if he had anything to say against the arrangement, but he never did so. The office of auditor was abolished by an act passed soon after the office of inspector of phosphates was created, but the incumbent was to continue in office and discharge its duties until 1st October, 1872, when all his
113 duties and powers were transferred to the comptroller general, *who* on that day Mr. Neagle, who was succeeded by the present incumbent's predecessor, Judge Hoge, who had been a justice of the supreme court of this State. Three inspectors of phosphates have held that office since its creation—Dr. Moses, Mr. Low, and the present incumbent, Mr. Waterman. All of these officers of the State in their official dealing with the Coosaw Company have recognized and acted upon the arrangement originally made, unless possibly Mr. Waterman, who, however, as far as we know, has never suggested any objection.

Fortunately we are not obliged to rest upon mere acquiescence of all these officials, the predecessors of the present comptroller general. We have possitive proof of their construction of both acts, the original grant in 1870 and the inspector's act in 1872, embodied in the printed blank forms for monthly returns prepared by them and required to be filled up and presented to the inspector, who from the returns has to make his annual reports to the comptroller general, who had one of these monthly returns before him when he made his

demand, and upon that monthly return, and not the inspector's annual report, based this demand.

There have been two or three forms of returns prepared and printed. The first was used from the time of the appointment of the first inspector until May, 1874, about which time Dr. Moses went out of office and Mr. Low succeeded him. This return is headed "Return of — number of tons phosphate rock and phosphatic deposits dug, mined, and removed from the beds of the waters of the State of South Carolina for the month ending the — day
114 of ——, A. D. 187–." Under this heading are nine columns, headed date, tons on hand, location, tons shipped, transportation, destination, captain, consignee, residence, showing plainly the distinction between what was on deposit and what had been removed and shipped.

The form of return now in use is even more distinct and definite than the first. It is headed, Return of phosphate rock mined or removed from the beds of the navigable streams within the jurisdiction of the State of South Carolina during the month of ——, 187–, by —. This return has four divisions.

The first of these is this:

	Number of tons.
On hand the first day of the month	
Mined during the month	
Removed during the month	
On hand the last day of the month	

NOTE.—Actual weight of the rock removed must be given; other quantities may be estimated.

The next division is—

Places of deposit of rock on hand at the end of the month.

The third division is—

From what localities mined during the month.

The fourth division has six columns, with a heading over all of them—disposition made of rock removed during the month—and over each of the six columns these headings: Date, number of tons, by what conveyance, captain of vessel, consignee or purchaser, destination. This appears to be constructed upon the interpretation we have given to the statute and cannot be explained
115 upon any other supposition.

Every item in this form seems to point to our understanding of the act. The four divisions or compartments of the form bear testimony to it throughout; but the note in the first divisions or compartment seems to preclude all doubt. Why should the actual weight of the rock removed be required and the other quantities allowed to be guessed at? The question can only be answered by saying that the accurate quantity of the rock removed was more important to the State than the other quantities, and there could be no other importance than that which was the main object of the

whole system, viz., to fix the amount of royalty to be paid; and it was thus necessary to distinguish the rock removed from that on hand at the first of the month from that moved during the month and from that on hand at the last of the month.

We have therefore shown the reasons which led us to our conclusion in our interpretation of the act granting the right to dig and mine, and the legislature itself gave it this same construction in the act creating the inspector's office, and that every official connected with the business, as far as known, has given both acts this same interpretation. Our opinion is that the demand made by the comptroller general is not authorized by the statutes.

Considered November, 1875.

EDWARD McCRADY.

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XXI.

Agreement.

Articles of agreement made and concluded this 15th day of March, A. D. 1870, by and between George W. Williams, Charles C. Coe, James H. Taylor, Joseph R. Robertson, Edwin Platt, and James Bridge, Jr., of the city of Charleston, South Carolina; William L. Bradley, of Boston, Massachusetts, and William Birnie, of the city and State of New York, of the one part, and Daniel H. Chamberlain, David T. Corbin, Reuben Tomlinson, Timothy Hurley, Edward Willis, Alexander R. Chisolm, Henry H. D. Byron, Robert Adger, David Jennings, Orsamus A. Bowen, Henry K. Silliman, and James B. Campbell, of Charleston, South Carolina; George M. Wells, of Beaufort, South Carolina, and George S. Brown, of the city of Baltimore, Maryland, of the other part:

Whereas by an act of the General Assembly of the State of South Carolina entitled "An act to grant to certain persons therein named and their associates the right to dig and mine in the beds of the navigable streams and waters of the State of South Carolina for phosphate rock and phosphatic deposits," passed March 1st, A. D. 1870, it is enacted as follows, to wit:

SECTION 1. That the State of South Carolina does hereby give and grant unto the following persons, to wit, George W. Williams, Charles C. Coe, James H. Taylor, Joseph R. Robertson, Edwin Platt, William L. Bradley, James Bridge, Jr., William Birnie, and such other persons as they may associate with them, the right to dig, mine and remove, for the full term of twenty-one years, from the beds of the navigable streams and waters within the jurisdic-
117 tion of the State of South Carolina the phosphate rock and phosphatic deposits.

Provided: That the persons named and their associates, shall not in any way interfere with the free navigation of the navigable streams and waters of the State, or the private rights of any citizen

or citizens residing upon or owning the lands upon the banks of the said navigable rivers and waters of the State.

SECTION 2. That this gift and grant is made upon the express con- on that the said grantees shall pay to the State of South Caro- diti the sum of one dollar per ton for every ton of phosphate de- lina, dug, mined and removed from the said navigable rivers and posits of the State; and, further, that the said grantees shall pay waters of easury of the State, the sum of five hundred dollars as a into the tr fore commencing business under said grant. license fee l

SECTION 3. Before commencing operations under authority of this es and their associates shall file, or cause to be filed, act, said grant the State auditor a bond, in the penal sum of fifty in the office of t as on deposit, said grantees and their asso- thousand dollars, conditioned that the said said State auditor an- ciates shall make true and faithful returns and oftener if required nually, on or before the first day of October, a osphate rock and by the State auditor, of the number of tons of ph from the beds phosphatic deposits dug, mined and removed by the punctually of the navigable streams and waters of the State and shall ber, one pay to the State treasurer annually, on the first day of Octo posits dollar per ton for every ton of phosphate rock and phosphatic dep by them dug, mined and removed from the beds of the naviga- 118 ble streams and waters of the State during the year preceeding. Said bond to be renewed annually and approved by the at- torney general. The books of the said grantees and their associates shall be open to the inspection of the State auditor or agent duly appointed by him for that purpose."

And whereas said George W. Williams, Charles C. Coe, James H. Taylor, Joseph R. Robertson, Edwin Platt, William L. Bradley, James Bridge, Jr., and William Birnie, the parties of the first part and the persons named in the said act, desire to associate with themselves in the privilege of said grant Daniel H. Chamberlain, David T. Corbin, Reuben Tomlinson, Timothy Hurley, Edward Willis, Alexander R. Chisolm, Henry H. D. Byron, Robert Adger, David Jennings, Orsamus A. Bowen, Henry K. Silliman, James B. Campbell, George M. Wells, and George S. Brown: Now, know ye that said parties of the first part, in consideration of the sum of ten thousand dollars, to them paid by said parties of the second part at and before the ensealing of these presents, have and do for themselves, their heirs, executors, and administrators, and every of them, covenant, promise, and agree to and with the said parties of the second part, their heirs, executors, and administrators, and every of them, by these presents, that said parties of the first part all and singular have associated and hereby do associate with them the said parties of the second part all and singular, to have and enjoy with them, said parties of the first part all and singular the rights and privileges that they, said parties of the first part, have and enjoy under the provisions of the above-recited act, and to have and be subject to all and singular the conditions

and obligations that they, said parties of the first part,
119 are subject to under the provisions of said act. The true intent and meaning of these presents is to associate with them, said parties of the first part, said parties of the second part in, to, and under the provisions of said grant as that said parties of the second part will have and enjoy with them, said parties of the first part, all and singular the rights and privileges and be subject to all and singular the conditions and obligations that they, said party of the second part, would have been, both to the said parties of the first part and to the State of South Carolina, its officers and agents, had they, said parties of the second part, been specially named as grantees in said act: Provided that of the said parties of the second part, to wit, George S. Brown, Robert Adger, David Jennings, Orsamus A. Bowen, Henry K. Silliman, and James B. Campbell, have been and are associated with said parties of the first part, to have and enjoy, under the conditions, limitations, and restrictions of the above-recited act, all the right of them, said parties of the first part, under said act, to dig, mine, and remove from the bed of the Coosaw river the phosphate rock and phosphatic deposits, and no other or further right whatsoever.

And of the said parties of the second part, to wit, Daniel H. Chamberlain, David T. Corbin, Reuben Tomlinson, Timothy Hurley, George M. Wells, Edward Willis, Alexander A. Chisolm, and Henry H. D. Byron, in consideration of the said covenants, promises, and agreements of said parties of the first part, have covenanted, promised, and agreed, and they do hereby promise, covenant, and agree, to be and become associated with them, said parties of the
first part, so as to have and enjoy all and singular the rights
120 and privileges under the provisions of said act with them, said parties of the first part, and to have and be subject to all and singular the conditions and obligations, under the provisions of said act, that they, said parties of the first part, have and are subject to, as hereinbefore by said parties of the first part more fully set forth and to the intent and purpose therein mentioned.

And of the said parties of the second part, to wit, George S. Brown, Robert Adger, David Jennings, Orsamus A. Bowen, Henry K. Silliman, and James B. Campbell, in consideration of said covenants, promises, and agreements of the said parties of the first part, have covenanted, promised, and agreed, and they hereby do promise, covenant, and agree, to be and become associated with them, said parties of the first part, so as to have and enjoy, under the conditions, limitations, and restrictions of the above-recited act, — to dig, mine, and remove from the bed of the Coosaw river the phosphate rock and phosphatic deposits, and no other or further right whatsoever.

All differences that may arise between said parties of the first part and George S. Brown, Robert Adger, David Jennings, Orsamus A. Bowen, Henry K. Silliman, and James B. Campbell, of the second part, relative to their respective rights under these articles, it is agreed, shall be referred to three arbitrators impartially chosen, as follows: one by each party and the third by the two named by the parties.

In testimony whereof the said parties of the first and second part have hereunto interchangeably set their hands and seals the day and year above written.

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GEORGE W. WILLIAMS. [L. S.]
CHARLES C. COE. [L. S.]
JOSEPH R. ROBERTSON. [L. S.]
EDWIN PLATT. [L. S.]
JAMES BRIDGE, JR. [L. S.]
DANIEL H. CHAMBERLAIN. [L. S.]
DAVID T. CORBIN. [L. S.]
REUBEN TOMLINSON. [L. S.]
TIMOTHY HURLEY. [L. S.]
ALEX. R. CHISOLM. [L. S.]
E. WILLIS. [L. S.]
H. H. D. BYRON. [L. S.]
GEORGE M. WELLS. [L. S.]
JAMES H. TAYLOR. [L. S.]
WM. BIRNIE. [L. S.]
WM. L. BRADLEY. [L. S.]
ROBERT ADGER. [L. S.]
JAS. B. CAMPBELL. [L. S.]
HENRY K. SILLIMAN. [L. S.]
GEORGE S. BROWN. [L. S.]
O. A. BOWEN. [L. S.]
D. JENNINGS. [L. S.]

Signed, sealed, and delivered in the presence of—as to Messrs. Williams, Coe, Robertson, Platt, Bridge, Chamberlain, Corbin, Tomlinson, Hurley, Willis, Chisolm, Byron, and Wells—

E. H. KELLERS.

Witness for James H. Taylor:

DUNCAN C. ROBERTSON.

Witness for Wm. Birnie:

GEO. W. FROY.

Witness for Wm. L. Bradley:

WM. G. REED.

Witness to signature of Rob't Adger, Jas. B. Campbell, Henry S. Silliman, Geo. S. Brown, O. A. Bowen, and D. Jennings:

JOHN B. WARREN.

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XXII.

Opinion of Attorney General James Conner.

EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, S. C., *December* 1, 1877.

By joint resolution of the General Assembly, approved June 9th, 1877, it was referred to the attorney general "to inquire into the matter of the several charters heretofore granted to the phosphate companies in the State, with a view to define and protect the rights

and interests of the State therein," and to "consider and determine the necessity, if such exist, of repealing the charters of some or all of the said companies," and "to ascertain what amount is due to the State for royalty by any of the companies or individuals authorized to dig, mine, and remove phosphate rock," and "to institute proceedings to recover the same for the use of the State."

In pursuing the investigation ordered by the above resolution it became necessary to ascertain what were the interests of the State and how they were effected by the rights and privileges granted to the several companies and the manner in which said rights and privileges were exercised by the companies.

Unfortunately there are scarcely any reliable data to enable us to determine accurately the extent and value of the phosphate interest of the State.

There has been no accurate survey determining the existence, location, or value of the phosphatic beds. The investigation hitherto made have been mainly by private individuals, confining
123 their examination to a few localities and with a view to immediate profit. Naturally these examinations have been made in comparatively shallow water, where the deposit could be most easily mined. That the phosphatic deposits exist in large quantities in the navigable waters of the State, over an area extending, as at present known, from Broad river to the Little Pee Dee, is well established.

The existence of equally valuable deposits in other localities is believed, but not known. It is thought by those best informed upon the subject that proper surveys, made with diving-bells or other appliances by which the beds of deep rivers could be examined, would establish the existence of valuable phosphatic deposits hitherto unknown.

The location and quantity of the phosphatic deposits are not, however, the only matters to be ascertained; the quality of them is material. There are even now large deposits which are comparatively useless because the rock does not contain sufficient phosphate of lime to be marketable.

A survey such as is above indicated would be expensive, but, without the information thus to be obtained, the State will be in the future, as it has been in the past, entirely ignorant of the value of the rights it grants away.

If the present system of granting licenses is to continue a survey will be needless, for the State has parted with all its rights everywhere.

The grant to each company is to mine in all the navigable waters of the State. The State has nothing more to grant, and in chartering new companies it only admits additional parties to a participation in the rights already granted.

124 II.—The rights and privileges of the several companies.

The companies to who- the right to dig and mine phosphates in the navigable waters of the State has been directly or indirectly granted are the following:

1. The Marine & River Phosphate Mining and Manufacturing Company of South Carolina.
2. The Coosaw Mining Company.
3. The South Carolina Phosphate Company, Limited, otherwise known as the Oak Point mines.
4. The South Carolina Phosphate and Phosphatic River Mining Company.
5. The Boatmen's Phosphate River Mining Company.
6. The Ladies' Island and Coosaw Company.
7. The Pa[illegible]netto Phosphate River Mining Company.

I propose to state as briefly as possible the source and extent of the legal rights required or claimed by these several companies.

1. The Marine & River Phosphate Mining & Manufacturing Company of South Carolina.

By act of the General Assembly, which became a law on the first of March, 1870, the veto of the governor notwithstanding (14 Statutes, 381), there was granted to certain persons therein named "and such other persons as they may associate with them the right to dig, mine, and remove, for the full term of twenty-one years, from the beds of the navigable steams and waters within the jurisdiction of the State the phosphate rocks and phosphatic deposits," the free navigation of the streams and the rights of the riparian proprietors being preserved.

125 The act further provides that the "grantees and their associates" should give bond to the State in $50,000 to make true returns and pay the royalty of $1 per ton.

On the 15th day of March, 1870, the parties named in the above act and their associates were duly incorporated under the name of the Marine and River Phosphate Mining & Manufacturing Company, by the clerk of the court for Charleston county, under the general incorporation act of the State. The capital stock under the charter was $500,000, and of this amount $250,00- has been paid in.

The Marine and River Company did claim, and perhaps still claims, that under the above act it possessed the exclusive right to dig and mine phosphates in all the navigable waters of the State, and that it was the grantee of all the rights which the State possessed over the phosphatic deposits in such streams and waters.

The journal of the senate shows that the act as originally drawn did contain the words "exclusive right," and that, on motion, the word "exclusive" was stricken out.

This action of the General Assembly in striking out the word "exclusive" and the subsequent grant of equal and similar privileges and rights to other companies indicate the legislative interpretation of the character of the grant.

The question whether the grant was exclusive or not was the subject also of judicial decision in the case of Bradley *vs.* The South Carolina Phosphate and Phosphatic River Mining Company in the circuit court of the United States for this district. The

126 case was elaborately argued and the decision of the court was that the grant was not exclusive. No appeal was taken,

and it may be presumed that the river and marine company acquiesced in this construction of its rights.

Prior to this decision or to any other grants by the legislature and at the outset of its career the Marine and River Company, by articles of agreement, gave to the Coosaw Mining Company the exclusive right to dig and mine in Coosaw river, and in like manner gave to the Oak Point mines the exclusive right to dig and mine in North and South Wimbee creeks, affluents of Bull river.

Whether it was competent for the Marine and River Company to give an exclusive right which it did not itself possess or to give any rights whatever may well be doubted; but the question is not of practical importance, for, as will hereafter be seen, the rights of these companies to dig and mine has been, to some extent at least, otherwise assured to them by the State.

The Marine and River Company has invested a large amount of capital in mining plant and machinery and has been steadily engaged in the business of mining. The amount of rock dug and royalty paid will be shown in another portion of this report.

2. The Coosaw Mining Company.

This is a joint stock and not an incorporated company. Its capital is $275,000, all of which has been paid in. In 1870 it purchased or leased a part of Chisolm's island, on Coosaw river, and there located its works and machinery, and commenced mining operations in Coosaw river by virtue of an agreement with the Marine and River Company, under the license or right granted by the
127 State to that company. During the earlier portion of its career it made its returns and paid the royalty to the Marine and River Company. Subsequently it executed its own bond to the State in the sum of $50,000 and made its returns and paid royalty directly to the State.

In 1876, by an act purporting to settle the periods at which returns should be made and royalty paid, very valuable privileges were granted to this company; its right to dig and mine in the navigable waters of the State was recognized, and it was granted "the exclusive right to occupy, dig, mine, and remove phosphate rock and phosphatic deposits" "from all that part of Coosaw river lying opposite to and South of Chisolm's island, whereon their works are located, and to the marshes thereof" (16 Statutes, p. 198). The Coosaw Company has ac-peted the act and complied with its provisions.

The same exclusive right they have "respectively occupied and established themselves for mining purposes" was, by the fourth section of said act, granted to "all other companies and persons engaged in digging, mining, and removing phosphate rock and phosphatic deposits as aforesaid under the gift and grant of the State of South Carolina or by authority thereof who shall accept the terms of this act within ten days from the passage thereof."

3d. The South Carolina Phosphate Company (Limited), otherwise known as Oak Point mines.

This is an English corporation.

Its capital is four hundred thousand ($400,000) dollars, all of which has been paid in.

In 1870 it purchased for one hundred thousand ($100,000)
128 dollars a tract of land on North Wimbee creek known as Kean's Neck, and supposed to contain valuable phosphatic deposits. It also obtained from the Marine and River Company the privilege to dig and mine within "certain boundary lines—that is to say, within the line drawn through the centre of North and South Wimbee creeks to low-water mark at their confluence and the high-water mark around their lands, saving to themselves all their proprietary and riparian rights as the owner of the plantation called Kean's Neck."

The company located its works and machinery at that point and dug and mined phosphates on land and in the waters of North Wimbee creek.

In 1874 the State instituted proceedings to enjoin the mining operations of this company in North Wimbee creek on the ground that it was a navigable stream, and that the rock therein was the property of the State, and that no license or authority to mine therein had been granted to that company by the State. The Oak Point mines, by its answer, claimed that North Wimbee creek was not a navigable stream, and that the State had no interest in the phosphate therein. Virtually the defendants claimed that their rights as riparian proprietors extended to the middle line of the stream.

The case was heard by Judge Maher, whose very able and elaborate decree settled the rights of the State and of the riparian proprietor, deciding that the stream was navigable; that the rights of the riparian proprietor extended to low-water mark, and that all phosphates below that line were the property of the State. In applying the principles of the decree to the facts of the case a
129 practical difficulty arose as to the line of low-water mark, the creek being at certain stages of tide almost dry, and it being referred to a referee he reported "that it is practically impossible to locate, with certainty and permanency, low-water mark or to designate the same with anything like mathematical precision," and he recommended "that one-half of all the rock dug and removed since the first day of October, 1875, and that shall hereafter be dug and removed by the defendant be adjudged to be the property of the defendant, and that the claim of the State be defined and limited to the other half thereof, and that the prescribed royalty be only paid by the defendant on said last-mentioned half" (Report of Asher D. Cohen, Esq., referee). This report was confirmed & ordered to "stand as the judgment of the court." (See order of Judge Maher, December 17th, 1875.) On the passage of the act of March, 1876, and within the time limited the Oak Point mines accepted the benefit of that act and claimed exclusive rights over the territory within which they had occupied and established themselves.

The difficulties which existed in determining the respective rights of this company and of the State and which compelled an equal division of the rock indicate the propriety of requiring careful provisions to guard and secure the rights of the State before granting a license to dig and mine in the waters of the State to any company which is engaged in mining on adjacent land. Where the proprietor of the land has the right to mine in the water-courses also the difficulty of separating that which is subject to royalty from that which is not *are* increased, while the means of detecting false returns are diminished. I have no reason to believe that
130 the returns of the Oak Point mines have not been perfectly just and accurate. But the system is open to grave objections, and if continued may result in loss, unless care is taken to properly guard the interests of the State.

4. The South Carolina Phosphate and Phosphatic River Mining Company.

This company was chartered by act of legislature approved March 9, 1871 (14 Stat., 688). Its capital was fixed at $2,000,000, with the privilege of increasing it to $5,000,000 and to organize and go into operation when $300,000 shall have been subscribed. The right to dig and mine was granted "for the full term of thirty years," and it was required to give bond in the sum of $50,000.

The rights, powers, and privileges of the charter are substantially the same as those contained in the act of 1870 in regard to the Marine and River Company.

The amount of capital stock subscribed was $200,000. The amount paid in up to this time is $2,000.

No portion of the capital of the company is invested in works, machinery, boats, or appliances for mining nor has it located or established itself anywhere with a "mining plant." Its operations are limited to granting permits to others to dig under its license and purchasing from them the products of their labor.

This company filed their acceptance of the act of 1876, granting to all companies exclusive right "where they have respectively occupied & established themselves for mining purposes," and in their acceptance claimed exclusive rights in the following rivers: Stono, Cooper, Edisto, Ashepoo, and Wando. In all these rivers exclusive rights are also claimed by the Boatmen's Company.
131 The evident intent and object of the act was to grant exclusive privileges in certain localities as a bonus and protection to those companies which had expended money and obtained a quasi-vested interest in such localities and to insure to them the advantages of the capital thus invested. The basis of the exclusive grant to the Coosaw Company is that they had "occupied so much of the Coosaw river as lies opposite to and south of Chisolm's island," had "located" themselves there, and had "expended large sums of money in establishing themselves thereon with sufficient mining plant," and "therefore, in consideration thereof," the act goes on and grants the exclusive right. If the investment of capital in a location and "establishing themselves thereon with a sufficient

mining plant for mining and preparing for market the phosphate rock" is the consideration of the grant of exclusive right, then it follows that where the consideration does not exist the grant does not take effect.

The South Carolina Phosphate and Phosphatic River Company have not "occupied and established themselves for mining purposes" within the meaning of the act or in any sense upon any of the rivers which they specify in their acceptance. To concede to them the exclusive right they claim over five rivers is to grant to them a monopoly of the most valuable phosphatic region of the State. It would exclude from those rivers and virtually destroy nearly every licensed company in the State and preclude the State itself from hereafter granting any license to other companies, as there would be no territory within which such new companies could mine.

132 The entire phosphate interests of the State, with one or two exceptions, would be vested in a company which had not expended a dollar in mining operations and was under no obligations either to invest capital in or to work the territory over which it had such exclusive right. Had this company claimed a single river or a defined territory and there occupied and established itself for mining purposes the act would have entitled it to claim defined exclusive rights. It has not done so, and I cannot regard the South Carolina Phosphate and Phosphatic River Mining Company as having complied with the act of 1876 or as entitled to any benefits under it.

5. The Boatmen's Company.

This company was incorporated by act approved January 29, 1874 (15 Statutes, p. 531), with the right to dig and mine for the full term of 30 years. Its capital was fixed at $30,000, with the privileges of increasing it to $100,000, and was authorized to go into operation when $3,000 of the stock should be subscribed. It was required to pay a license fee of $100 and give a bond in $5,000 to make true returns. On the passage of the Coosaw act, in March, 1876, this company signified their acceptance of the act and claimed exclusive right to dig and mine phosphates in the following rivers, viz: Wando, Cooper, Back, Ashley, Stono, Edisto, Ashepoo, Bull, Beaufort, Combahee, Fillburn creek, Rantowl's creek, Schooner creek, and North and South Wimbee creeks.

As the company had not invested a dollar in "mining plant" and had not "occupied or established themselves" on any one of the rivers claimed by them, all that is said above as to the claim

133 of the South Carolina Phosphate and Phosphatic River Mining Company equally applies to the Boatmen's Company, and I cannot regard it as having complied with the act of 1876 or entitled to any benefits under it.

6. The Ladies' Island and Coosaw River Mining Company.

This company was incorporated by act approved March 3, 1876 (16 Statutes, page 95), with a capital of $30,000 and privilege of increasing it to $100,000 and the right to organize and go into oper-

ation when $3,000 of stock should be subscribed. It was required to pay a license fee of $100 and give bond in $5,000 to make true returns. The company has never organized or complied with the act. It is for the legislature under these circumstances to determine whether it will continue or repeal the charter.

7. The Palmetto Phosphate River Company of Charleston, S. C.

This company was incorporated January 27, 1877, by the clerk of the court of Charleston county under the general incorporation act. It had no legal authority to dig and mine in the waters of the State. It had no capital invested in mining plant or machinery, and, although the legislature at its last session by resolution postponed all bills relative to phosphate companies, it subsequently, by a concurrent resolution which recited that it would be a "peculiar hardship" to this company to stop its operations, authorized the comptroller general to issue a permit to it to dig and mine until the next session of the General Assembly.

The comptroller general has, under the concurrent resolution, granted a permit or license to this company until the next
134 (the present) session of the legislature. Although this company was digging phosphates without any legal authority and was really a trespasser, the legislature accorded to it privileges which were withheld from all other companies applying at that session for licenses or charters.

There are a number of other companies, incorporated and joint stock, some of them with large capitals, which are engaged in the business of digging and mining phosphates, but as their operations are carried on on land or in *in* navigable streams they require no license from the State and do not fall within the scope of this investigation.

Before leaving the subject of the legal rights of the several companies it is necessary to call attention to some of the provisions of the act of 1876.

As the State by this act gave to all companies who should comply with it an exclusive right in lieu of the right previously held in common and received no consideration therefor, it is for the interest of the State that the privileges granted should not be extended beyond their legal limits. The exclusive right granted to the Coosaw Company "to occupy and dig and mine and remove phosphate rock and phosphatic deposits from Coosaw river" is "so long as and no longer than they shall make true and faithful returns" and punctually pay the royalty thereon as provided in the first section of the act.

The exclusive right granted to all other companies which accept the act is "on the same limitations."

Do these words grant to these companies a perpetual license, conditional*ly* only on their making the return and payment of the royalty? I do not so think.

135 The right of the Coosaw Company to dig and mine was derived from the grantees in the act of 1870. Those persons had license to dig and mine only for the term of twenty-one years,

and, of course, could not grant to the Coosaw Company any greater rights than they possessed themselves.

When the Coosaw Company applied for the passage of the act of 1876 it had already established itself in the Coosaw river and was digging and mining and making its returns and paying its royalty and was under bonds to the State. It required no further or greater rights or license to dig and mine in that locality, and the act of 1876 gives no such right or license. It recognizes the right of the Coosaw Company as already existing and converts it from a right which might be shared in by others into an exclusive right enjoyable only by the Coosaw Company. It changes the quality of the right and makes it exclusive "so long as and no longer than the conditions on which the exclusive character depends are performed, but it is silent as to the quantity or duration of the right. That depends upon the terms of the original grant.

It does not seem to me that the act goes beyond this. In the title it is described as "An act to settle definitely the periods at which returns shall be made of phosphate rocks and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina and the royalty shall be paid thereon, and also to fix the terms on which this act may be accepted by the parties therein named," no allusion being made, however indirectly, to the granting of any rights; and in the preamble it is stated
136 that "Whereas differences have arisen between the Coosaw Mining Company and the comptroller general as to the times and manner in which the returns shall be made and the royalty paid: Therefore, for remedy thereof, be it enacted," &c.

By the title and preamble the object of the act is limited to the time and manner of paying royalty, and for remedying thereof the act is enacted. Had anything further been contemplated, especially anything so important as a perpetual license, it should have been expressed in the title in accordance with the constitutional provision that every act "shall relate to but one subject and that shall be expressed in the title" (art. 11, p. 20).

The purpose of such constitutional provision, as said by Mr. Cooley in his treatise on Constitutional Limitations, p. 143, 1st edition, is, first, "to prevent log-rolling legislation;" second, "to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted;" and, third, "to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon by petition or otherwise, if they shall so desire;" and the supreme court in Michigan, in constituting a similar constitutional provision in People *vs.* Mahoney (13 Mich., 494), says that the intention of it was to remedy a practice by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their pas-
137 sage secured through legislative bodies whose members were generally not aware of their intention or effect.

To hold that the substitution of an exclusive for a general right extends the duration of the right from a term of years to perpetuity violates the settled rule of construction applicable to statutes containing public grants. The rule is uniform that "not-ing passes but what is contained in clear and explicit language." (Dubuque R. R. Co. *vs.* Litchfield, 23 How., 66.) "The reason of the rule is obvious. Parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently clear and explicit to pass everything that is intended to — passed it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms;" or, as said by Chief Justice Marshall in Providence Bank case, 4 Peters, 561, "When it is alleged that the State has surrendered for all time a valuable privilege or power the community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." "Nor is the doctrine limited to the taxing power. Whenever any power of the State is said to be surrendered or terminated, whether it be the taxing power or any other affecting the public interest, the same principle applies and the rule of construction must be the same."

According to the views which I entertain and have expressed above, only the Coosaw and Oak Point Mines Companies have
138 complied with the provisions of the act of 1876, but the Boatmen's and the South Carolina Phosphate and Phosphatic River Mining Companies equally claim the benefits of the act. If their claim should be decided to be valid and the act is to operate as a perpetual license, it must also as to these two last-named companies operate as a repeal of the acts granting to them licenses for the term of thirty years; but repeals by implication are not favored, and the construction which leads to such a result is to be avoided.

Whether any or all of the companies claim such perpetual license I am not advised, nor have I felt myself authorized to inquire, as the legislature alone is competent to deal with the subject. My duty is performed in calling attention to the terms of the act and the questions which may arise under it. There is enough in the very skillful wording of the act to raise the doubt and indicate the probability, if not certainty, of such claim being made hereafter when the terms for which the licenses were granted shall have expired.

It is scarcely prudent to leave the question an open one until then, and, unless the State acquiesces in the doctrine that a perpetual license is granted to all companies which comply with the act of 1876, it will be for the legislature to adopt such measures as, in its judgment, may be necessary for the protection of the rights and interests of the State.

III.—The manner in which the rights and privileges of the several companies are exercised.

Passing from the legal rights of the several companies to their

mode of exercising them, it will be observed that the com-
139 panies are devided into two classes—those which have capital invested in a mining plant and work with the aid of machinery, such as the Marine and River, the Coosaw, and the Oak Point Companies, and, second, those which have no mining plant or facilities and do not themselves work under their licenses, but grant permits to others to use their licenses and sell to them at a stipulated price the product of their labor, which they in turn sell to the home factories or the foreign shipper. Under this latter class are the South Carolina Phosphate and Phosphatic River Mining Company, the Boatmen's, and the Palmetto. The difference in value to the State of these two modes of exercising the charter privileges will appear hereafter.

The phosphate deposits in the navigable waters of the State lie at varying depths. In some localities they are exposed by the receding of the tide, in others they are only a few feet, and in others, again, are at depths of twenty, thirty, and forty feet below the surface of the water. The rock itself is sometimes in loose nodules, easily gathered by hand or tongs, and sometimes the nodules are firmly impacted into a solid mass, designated by some as strata rock, and only to be broken and gathered by the aid of powerful machinery. In some localities the rock lies on the bed of the river; in others it is covered by sand or mud of varying thickness, which must be dug through in order to reach the deposits.

That portion of the deposits which lies on the beds of the river and in shallow water can be gathered by hand or tongs; the residue can only be obtained by the aid of machinery. The estimates vary as to the relative proportion of the rock which
140 & 141 has been gathered by hand and that which has been obtained by machinery. Of course, that which was most easily obtained has been the first gathered, and the weight of opinion seems to be that the larger portion of the phosphatic deposits now remaining lies in deep water and is attainable only by machinery; but all of the experts who have been examined by me unite in the opinion that both systems of working are essential; that a river or stream cannot be thoroughly worked and the phosphatic deposit exhaus-ed except by the aid of both systems—the dredge or other machinery for that portion which lies in deep water, and "hand-picking" in shallow water, where the dredge cannot so well operate. The companies of the first class unite both systems; the companies of the second class use no machinery, and their labors, therefore, never exhaust a river of its deposits, but are confined to gathering the loose rock, leaving untouched the larger deposits in deep water. In a word, they gather that which is attainable at little expense and leave the more costly mining to the companies who have invested capital in proper mining machinery.

This mode of exercising charter privileges is injurious alike to the State and to the companies who have invested money in machinery and appliances necessary to prosecute the work. The latter complain, and with justice, that the State neither protects its own

interests nor theirs; but the evil is a necessary consequence of the defective legislation.

The right originally granted to each company extended to all the navigable waters of the State, and consequently when any company discovered the existance of phosphates in any given locality
142 and proceeded to mine them, other companies swarmed in upon it and reaped the fruits of its surveys. No company had any right to the phosphates until dug and removed, and the right to dig and remove was common to all. Instances have been brought to my notice in which the dredges of one company have been followed by boats of another company which gathered the rock as it was broken and dislodged by the dredge. It is a matter of wonder that serious collisions have not occurred from such conflicts of interests, and it is hardly wise for the State to continue legislation which naturally tends to a breach of peace. The companies which exercise their privileges by means of permits complain in their turn of the defective legislation. Parties frequently obtained permits from two or more companies at the same time, and sold the rock dug under the permit to neither, but disposed of it to some third party, and the company granting the permit was thus deprived of its profits and the State of the royalty. Only the licensed company paid the royalty, and the practical operation of the permit system has been to offer a premium to the miner or laborer not to sell to the licensed company, for the outsider, paying no royalty, could afford to add that to the price of the rock.

The act passed at the last session of the legislature, which prohibits under penalties any one from purchasing rock from or selling rock to an unlicensed person or company, may prove a protection to the companies and the State, but it has not been in force sufficiently long to enable us to judge of its effect. The different modes of working practiced by these two classes of companies has a material
143 bearing upon the phosphate interests of the State.

Deposits of phosphate rock are not confined exclusively to this State. They are found in several places in Europe, and the rock of this State has to come into competition in the European markets with the rock there producted.

The value of the rock is regulated commercially by its analysis. Fifty-five per cent. of phosphate of lime is the standard, and unless it analyzes that it is unmerchantable.

The rock of this State is not designated in the European markets by the name of the mining company from which it comes, but is all embraced under the general name of Carolina river rock, and unless the standard is maintained there is a depreciation in value which affects not merely the particular shipment or company, but extends to the entire class known as the Carolina river rock.

If the loss arising from careless or unskillful preparation fell exclusively on those who were responsible the evil might simply be left to work its own cure; but as the injury results to all, it can only be corrected by a power sufficiently strong to govern all. If the demand regulates the supply and the preparation regulates the de-

mand it is of importance to the State that there should be the most skillful preparation.

The testimony taken is very full and clear that the marketable value of the rock—its conformity to standard—depends in considerable degree upon its preparation for market, and this requires railways, drying-houses, engines, and machinery adapted to the purpose, and these, in turn, demand a fixed location and capital for their erection and employment.

144 There is also an advantage to the State in the fixed locality of the companies. Where their works are erected their wharves are constructed, as the loading is direct from the works to the ships. The facilities for inspecting the operation of the companies and ascertaining their products are greater, and the bills of lading of the vessels and the clearances at the custom-house furnish the means of checking and verifying the returns of the companies, as these are based upon the shipments.

Where the companies have not fixed works, but sell to others, there is no mode of verifying the returns, and the State is dependent entirely upon the good faith of the company making the return.

Whether regard is had to the proper working of the phosphatic deposits of the navigable waters, so as to realize the largest yield, or to the proper preparations of the product for the market, so as to ensure the greatest demand and the largest price, or to the security of the State for the collection of its revenue, the conclusion has been forced upon my mind that these objects can best be accomplished by companies possessing capital and having fixed location and adequate mining plant and machinery for digging and preparing the rock.

That I may not seem to attach undue importance to the necessity of the employment of capital in the mining operations and to the advantage of fixed works in securing the largest revenue to the State, I refer to the returns of production on which royalty is payable made by the several companies:

145

	Coosaw.	Marine and River.	Oak Point.	P. & P. Company.	Boatman.	Total.
1870	------	1,989.50	------	------	------	1,989.50
1871	------	17,655.40	------	------	------	17,655.40
1872	------	22,502.90	------	------	------	22,502.90
1873	9,964	22,416.58	11,926	1,471.18	------	45,777
1874	23,310	14,136.50	18,156	2,114	------	57,716.50
1875	25,751	21,690.80	18,580	1,948	------	67,969.80
1876	33,579	28,507	18,895	913	18	81,912
	92,604	128,895.6	67,557	6,446	18	295,523

Taking the returns of the three companies, with capital and mining plant, and the two companies, with small capital and no mining facilities, and they stand as follows:

Coosaw	92,604
Marine and River	128,985
Oak Point	67,557
	289,056
South Carolina Phosphate and Phosphatic Company	6,446
Boatman's Company	18
	6,464

It thus appear- that the royalty on the production of the companies operating without capital or mining plant was, up to October 1, 1876, only a little over two per cent. of the entire royalty for that period; but the South Carolina Phosphate and Phosphatic Mining Company commenced work in 1873 and the Boatman's Company in 1875, so that the above aggregate does not fairly represent the relative work of the two classes of companies; but the return
146 for the year ending September 1, 1877, does, and that is as follows:

Coosaw.	Marine and River.	Oak Point.	So. Ca. Phosphate and Phosphatic.	Boatman's.	Palmetto.	Total.
73,202	24,723	24,744	1,688	2,254	378	126,569

Aggregate of Coosaw	73,202
Marine and River	24,273
Oak Point	24,774
	122,249
Aggregate of South Carolina Phosphate and Phosphatic Mining Company	1,688
Boatman's Company	2,254
Palmetto	378
Total	4,320

or about three and one-half per cent.

The managing officers of the several companies, however much they differ on other points, all concur in condemning the present system as injurious to them and to the State.

1st. It affords no protection to the capital invested in mining or to skill or energy employed in it.

2nd. It does not secure to a company the benefits of any deposit of phosphates which it may discover by its surveys, but leaves the discoveries so made free to all.

3rd. It gives to companies without capital the same privileges which it accords to large investments.

4th. It makes no provision for a careful and exhaustive working of the deposits, but allows the companies to take that which is most valuable or most easily gathered from one locality, and then pass to another.

147 5th. It contains no provision for an accurate return of the product or payment of the royalty on it to the State and exacts from some companies a bond of $50,000, while from others it requires a bond of only $5,000.

IV.—The remedy.

I am not unaware of the difficulty of suggesting the appropriate remedy for the existing evils, but, having conferred with those who have directed their attention to the development of this branch of industry and finding that the representatives of all the companies—those with capital as well as those without—united in recommending the same remedy, I am led to the conclusion that it is possibly the safest which the legislature can adopt. The remedy suggested is for the State to grant for a specified period the exclusive right to dig and mine phosphate rock and phosphatic deposits from its navigable waters, within certain well-defined limits, to such incorporated companies as shall, after due notice of the plan adopted, apply for the privilege and indicate the territory within which they desire to work, and to require from every company to which such grant is made not only security for just returns and prompt payment of the royalty, but also that they will within prescribed periods establish themselves within the territory granted with mining plant and machinery sufficient for the systematic and exhaustive working of the phosphatic deposits within such territory and with sufficient actual capital to insure the thorough performance of the work.

These provisions are similar to those of the act of 1876, but in the application of them there are important points of differ-

148 ence between that act and the plan suggested.

The act of 1876 is objectionable, not because of its provisions, which are to great extent wise, but because it was discriminating and partial legislation in the interest of a particular company and to the injury of other companies and the State. Under that act the only actual grant of territory was to a single company, and was made previous to the adoption of any plan or system of granting exclusive rights applicable to all companies, and thus operated partially, whereas under the plan suggested the system is adopted before any grant is made. All are advised of their rights and placed upon an equal footing. The opportunity is thus afforded of settling any conflicts of right to territory before a grant is made of the same, which is not afforded by the act of 1876.

It fixes the periods for which the rights are granted and avoids the ambiguity of the act of 1876.

It extends to all companies which may apply, whether existing or to be created, whereas the act of 1876 was limited to companies already existing, and only gave to them ten days within which to learn of the act and accept its provisions.

And above all it reserves to the State the power of control by granting the privileges only to incorporate companies.

The effect of such legislation will probably be to substitute a few large companies with adequate capital and mining facilities for the many small ones which exist or desire to be incorporated.

But if the experience thus far obtained is to be any guide, the advantage to the State of large companies is too important to
149 be neglected. It is from them, as has already been shown, that the royalty of the State is almost entirely derived.

It may be said that there would be greater competition between several small companies than between a few large ones who could more easily combine, but it must be remembered that as the royalty is a fixed price per ton, and that the State is unaffected by either competition or combination regulating the price of the article, the main question of interest to the State is under which system the largest and most continuous revenue can be obtained.

V.—The power of the State over the licenses already granted.

If the phosphate interest of the State was wholly within its control, unembarrassed by previous legislation, there is little doubt but that a system of granting licenses could be devised, either on the plan above suggested or some other, which would secure a greater development of the phosphate industry, greater and better protection to the companies, and increased revenue to the State. Unfortunately, the power of the State over the subject is partially restricted by the previous legislation, which seems to have been confined to enacting into laws the wishes of the phosphate companies, the interest of the State alone being unprotected. It was doubtless under this impression that the legislature referred it to me "to consider and determine the necessity, if such exist, of repealing the charters of some or all of the said companies."

It is useless, however, to consider the necessity or policy of a repeal unless the power to repeal exists.

Where the license or right to dig is part of the charter or
150 franchise of a company incorporated by the State, then, under the 1st section of article XII of the constitution and the 41st section of the act of 1841, which provides that it shall become a part of the charter of any corporation that "such charter shall at all times remain subject to amendment, alterations, or repeal by the legislative authority," the license to such companies may be altered or revoked.

This section of the act of 1841 and the power of the State under it was construed by the Supreme Court of the United States in the case of Thomlinson *vs.* Jessup, 15 Wall., which said: "The power reserved to the State by the law of 1841 authorized any change in the contract.

"The object of the reservation is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contracts with the corporators,

which without that provision would be irreparable and protected from any measures affecting its obligation."

But neither the Constitution nor the act of 1841 apply to joint stock companies or other associations not incorporated by the State. The revocation of their powers depends upon the general law.

What under that law are the respective rights of the companies and of the State?

It has been earnestly argued that by the act of 1870 the State granted to the persons named therein and who subsequently became the Marine and River Mining Company the phosphates *in situ;* that the act was a grant of chattels, real or corporeal hereditaments, and not the grant of a license or mere incorporeal right. I
151 have carefully considered the authorities and argument, but am unable to concur in the view that there was any grant by the State of the phosphate or phosphatic deposits *in situ.*

Whether the act is to be interpreted by the ordinary rules of construction or by the more stringent rule which in the cases of public grants raises every intendment against the grantee and in favor of the State, there is not in either case anything in the act which vests in the grantees the phosphates or phosphatic deposits in the beds of the rivers.

The only grant of the phosphates is when dug and removed, as of the deer when killed, in the case put by C. J. Vaughn (Vaughn's Reports, page 351). There are no words granting an estate or property in the soil or in the deposits. "If (as said by C. J. Woodward) the grantees acquired no estate in lands or minerals what is their right to be denominated? Answer. A license to work the land for minerals." Funk *vs.* Halderman, 53 Penn. Rep., 243. And Mr. Bainbridge, in his treatise on the law of mines, says (page 300): "There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter is only a mere incorporeal right to be exercised in the lands of others. In order to ascertain whether an instrument must be considered as a lease or a license, it is only necessary to determine whether the grantee has acquired by it an estate in the land in respect of which he might bring an action of ejectment. If the land is still to be considered in possession of the grantor the instrument will only amount to a license, and though the grantee of the license will certainly be entitled to search and dig for mines according to the terms
152 of his grant and appropriate the produce to his own use on payment of the stipulated rent, yet he will acquire no property in the minerals till they are severed from the land and have thus become liable in an action of trover."

Is the grant in the present case a grant of an "actual interest, an estate in the land," in the beds of all the navigable waters of the State, or the grant of an incorporeal right, to be exercised on the lands of the State? Are the beds of the rivers in the possession of the grantees or in possession of the State? If still in the possession of the State, then, on the authority just cited, the grant is only of a license.

The express words of the act seem to me to put this beyond question, for not only are there no words passing any interest or estate in land, but the express words used grant the right to "dig, mine, and remove," and designate the fee to be paid before the right can be exercised as a "license fee."

But the conclusion that it is a license does not end the difficulty. The perplexing question still remains, Is the license revocable? Does it so partake of the nature of a contract that no legislation can impair it, or is it only a vested right which may be annulled by express legislation?

These are intricate questions, and although I have given to them all the attention I am capable of, I express with diffidence the conclusion I have reached. It may well be that a court enlightened and advised by elaborate argument would announce a different and wiser judgment.

But the question has been referred to me, and I must report upon it. I do not propose, however, to enter into an extended argument or citation of authorities, but to state as briefly as is consistent
153 with clearness the reasons and authorities which have influenced my judgment.

It is true that "a license is in its nature revocable," but this is applicable only to that which is a mere license. The power of revocation may be limited or qualified by the terms of the grant, as when "the grant is for a specific period" or when the license "is coupled with an interest which depends upon and cannot be enjoyed without the continuation of a license. (See Wood *vs.* Leadbitter, 13 Meeson & Welsby, 846.)

It is not essential that the interest should be in the thing to which the right given by the license relates or upon which it is to be exercised. "All that is necessary to deprive the licensor of the power of revocation is that he should have given, or that the licensee should possess, some estate or interest which depends on the continuance of the license and which cannot be enjoyed if it be withdrawn or amended." (2 American Leading Cases, p. 738.)

In the case of Webb *vs.* Paternoster, Popham Reports, cited by Baron Alderson, in the leading case of Wood *vs.* Leadbitter, 13 Meeson & Welsby, p. 846, it is said "a license for profit for a term certain is not revocable," and, adds Baron Alderson, "a proposition to which, with the qualification we have already pointed out, we entirely accede," the qualification referred to being the distinction between a license which will justify what would otherwise be a trespass and a license coupled with an interest, or, as said by Mr. Bainbridge (Law of Mines, p. 306), a license which "gives some usufruct of the land itself."

The license to "dig and mine" in the cases before us is for the full term of twenty-one years.

154 What is said by Chief Justice Marshal in Hunt *vs.* Rousamanier, 8 Wheaton, 174, in regard to a power of attorney seem- to me applicable to the license here. After laying down the general rule that "the power depends on the will or license of the party granting" and ceases when the will or permission is with-

drawn, he adds: "But the general rule has sustained some qualification. Although the letter of attorney depends from its nature on the will of the person making it and may in general be recalled at his will, yet if he binds himself for a consideration or in terms or by the nature of the contract not to change his permit, the law will not allow him to change."

Has the State in terms or by nature of the contract precluded itself from revoking the license?

The agreement on the part of the State was to grant for the specified period the licence to dig and the phosphates dug and removed.

The agreement on the part of the grantees was to pay the license fee, give the bond, and pay the royalty. When the grantees of the license accepted and acted under it, it became an executed agreement or contract and the rights acquired under it protected, not because they are vested rights, for these can be revoked by express enactments of the legislature (see Charles River Bridge Case, 11 Peters, 540; Milne *vs.* King, 5 Rich., 150), but because they are rights acquired under contract, and there is constitutional inhibition of laws impairing the obligation of contracts. It must be remembered that I am now speaking of that class of cases to which the 41st section of the act of 1841 does not apply.

155 The equitable grounds which preclude a revocation are equally strong.

What is said by Chief Justice Gibson in the leading case of Rerick *vs.* Kern, 14 Serg't and Ravl., 267, is directly in point: "But a license may become an agreement on valuable consideration, as where the enjoyment of it must necessarily be preceeded by the expenditure of money, and when the grantee has made improvements or invested capital in consequence of it he has become a purchaser for valuable consideration. Such a grant is a direct encouragement to spend money, and it would be against all conscience to annul it as soon as the profits expected from the expenditure is beginning to be received.

This case and those which follow and support the doctrine are, it is true, cases between individuals; but the inability of the State or any individual to revoke a license granted rests upon the same principle, as sound in morals as in law, that a party making a promise with the view of inducing others to act cannot, after they have acted, withdraw it to their injury unless the right to do so is reserved at the time the promise is made. If I am correct in these views the result reached is this: That the license to the Marine and River Mining Company, to the South Carolina Phosphate and Phosphatic Mining Company, and to the Boatman's Company are within the control of the legislature and can be amended or revoked. The license to the Palmetto Mining Company expires by its own limitation at this session of the legislature, and is consequently entirely within its control. The license- to the Oak Point mines and to the Coosaw are beyond the control of the legislature until the term of twenty-one years from March 1st, 1870, has expired.

156 It does seem an anomaly that the State can revoke the

license granted to an incorporated company, but cannot revoke it when granted to an unincorporated company.

The distinction, already adverted to, is this: When the State grants a license as part of the charter privileges of a company it reserves to itself by the 41st section of the act of 1841 the absolute power to amend, alter, or repeal all or any portion of the rights and privileges granted, and the company accepts the grant with this reservation. The State can thus at any time, by virtue of this reserved right, control and regulate the corporation as the interests of the State may require.

In the grant of privileges to individuals or unincorporated companies no such right is reserved.

It is to be regretted that the legislature should have improvidently parted with valuable privileges and interests without reserving the right to control or modify them as the interests of the State might require; but it has done so, and I am called upon to report what, in my opinion, is the legal effect of such action.

But, while the charters and privileges of the three first-named companies are within the control of the legislature, there is, I respectfully submit, an equity in these companies which entitles them to a preference over any new companies which may be created.

They are already in existance under authority of the State, and the Marine and River Company has expended capital in improvements and machinery, and the South Carolina Phosphate and Phosphatic Company, and perhaps the Boatman's also, have had heavy expenditures in asserting and establishing their rights by
157 legal proceedings, all to a greater or less extent with capital embarked in business, and if they can comply with the new requirements they have a just claim to the consideration of the legislature. If the remedy suggested (page 18) meets the approval of the legislature the object of new legislation will be to establish a permanent and general plan or system of granting licenses under which the powers, duties, obligations of the companies shall be specifically defined, the amount of paid-up capital fixed, the mode of applying for and obtaining specific territory prescribed, and proper provisions made for the protection of the companies in the enjoyment of the rights and territory granted to them and to insure to the State the proper exercise by the companies of the rights granted and the payment of the royalty on the entire product.

A uniform system, applying as far as possible to all companies, is unquestionably the safest and best, and I would respectfully suggest that all the needed provisions be embodied in a single act under which the companies can from time to time apply for licenses. We have on the statute book a general act regulating the formation, powers, &c., of corporations. A similar act could be passed providing for the creation and government of phosphate companies, and to none but incorporated companies, subject to the act of 1841, should licenses be granted.

Whether the selection and allotment of territory to the respective companies shall be made by the legislature or whether each company shall be permitted to select the territory within which it will

operate are matters of legislative discretion and not within
158 the scope of this report, but, whichever course be adopted, some provision must be made for determining the respective rights in case two companies should specify and apply for the same territory.

The royalty due the State.

It has also been referred to me to ascertain what amount, if any, is due to the State for royalty by any of the companies.

In order to ascertain whether the amounts returned by the several companies to the State were correct, I obtained returns from the United States custom-house at Beaufort and at Charleston of all shipments of phosphate made from either port since 1870, and have had each shipment traced and verified and these carefully compared with full statements of the shipments taken from the shippers' books—a work of great labor, but absolutely necessary in order to ascertain if the royalty had been fully paid.

The same facilities for obtaining a record of the phosphates shipped coastwise do not exist, as coastwise vessels are not required to clear at the custom-house; but as nearly the entire bulk of the river phosphates is shipped to foreign ports, and almost all the land phosphates are used at home or shipped coastwise, the custom-house returns furnish for all practical purposes a reliable statement of the product of the rivers.

Without encumbering this report with details, either of the custom-house returns or of the shippers' statements, the following tables will show, it is hoped, with sufficient fullness, the product of each company for each year of its existance and the movement of the phosphates.

The last of these tables contains a general tabular statement of the annual product of all the companies and the royalty paid:

159 From 17,655 tons in 1871 the product had reached 125,667 tons in 1877, and it will be noted that the product of the last year exceeded that of 1876 by 43,110 tons, a gain of over fifty per cent.; and, as each ton represents a dollar paid to the State, the importance of such a legislation as will develop and protect this industry will be appreciated by all.

I.—The Marine and River Phosphate Mining and Manufacturing Company.

Shipments of Phosphate Rock, 1870 *to October 1st*, 1877.

Year ending Oct. 1.	Foreign shipments.	Coastwise and interior.	Total tons.	Royalty paid.
1870	1,325	664.904	1,989.904	$1,989 40
1871	13,735.64	3,919.1600	17,655.240	17,655 00
1872	17,653.1398	4,849.403	22,502.1801	30,267 49
1873	1,989.1060	20,426	22,416	14,651 58
1874	8,475.1904	5,660.1254	14,136.918	14,137 00
1875	19,797.271	1,893.1358	21,690.1624	21,690 72
1876	22,542	5,964	28,507	3,539 35
1877	24,273		24,273	
Total	109,792	43,379	153,171	$103,930 54

The South Carolina Phosphate Company (Limited), Oak Point Mines.

Shipments of Phosphate Rock, 1872 *to September* 1, 1877.

Year ending Sept. 1.	Foreign shipments.	Coastwise and interior.	Total tons.	Royalty paid.
1873	8,955	2,971	11,926	
1874	11,137	7,019	18,156	
1875	18,580		18,580	$28,000 00
1876	18,895		18,895	6,251 50
1877	23,611	1,163	24,774	11,914 00
Total	81,178	11,153	92,331	$46,165 50

N. B.—By decree of court company pays royalty on one-half production.

160 III.—The Coosaw Mining Company.

Shipments of Phosphate Rock, 1872 *to September* 1, 1877.

Year ending Sept. 1.	Foreign.	Coastwise and interior.	Total tons.	Royalty paid.
1873	9,964		9,964	$9,964 00
1874	23,310		23,310	23,310 00
1875	25,751		25,751	25,751 00
1876	33,579		33,579	33,579 00
1877	73,202		73,202	73,202 00
Total	165,806		165,806	$165,806 00

IV.—South Carolina Phosphate and Phosphatic Mining Company.

Shipments of Phosphate Rock, 1873 to October 1, 1877.

Year ending Oct. 1.	Foreign and coastwise.	Interior.	Total tons.	Royalty paid.
1873	1,471		1,471	$1,389 18
1874	2,114		2,114	2,198 20
1875	1,948		1,948	2,007 45
1876	913		913	193 63
1877	1,688		1,688	2,337 00
Total	8,134		8,134	$8,134 46

V.—Boatman's Phosphate River Mining Company.

Shipments of Phosphate Rock—March, 1876, to Aug. 31, 1877.

Year ending Sept. 1.	Foreign shipments.	Coastwise and interior.	Total tons.	Royalty paid.
1876	18		18	$18 60
1877	1,996	258	2,254	2,253 50
Total	2,014	258	2,272	$2,272 10

VI.—Palmetto Phosphate River Mining Company.

Shipments of Phosphate Rock, 1877.

Year ending Sept. 1.	Foreign.	Coastwise and interior.	Total tons.	Royalty paid.
1877	378		378	$378 16

VII.—*General Table of Annual Phosphate Shipments and Royalty Paid Thereon, &c.*

Fiscal year ending September 1.	1870.	1871.	1872.	1873.	1874.	1875.	1876.	1877.	Total shipment.	Royalty paid.	Balance royalty due.	Remarks.
Coosaw Mining Company	.....	.....	.....	9,964	23,310	25,751	33,759	73,202	165,806	$165,806 00	.....	Royalty paid in full to State treasurer.
South Carolina Phosphate and Phosphatic Mining Company.	.....	.....	.....	1,471	2,114	1,948	913	1,688	8,134	8,134 00	.....	Royalty paid to State treasurer..... $7,485 Royalty collected by Attorney General Conner..... 649 $8,134
Marine and River Phosphate Mining & Manufacturing Company.	1,989	17,655	22,502	22,416	14,136	21,690	28,507	24,273	153,171	103,930 54	$49,241 46	Company claims that $24,967 of royalty due is not due, because rock mined was not standard phosphate rock.
South Carolina Phosphate Company (Limited), Oak Point mines.	.....	.....	.....	11,926	18,156	18,580	18,895	24,774	92,331	46,165 50	.....	Under order of court company pays royalty on one-half of its production. Royalty paid State treasurer ..... $18,165 50 Royalty paid Messrs. Corbin & Stone..... 28,000 00 $46,165 50
Boatmen's Phosphate River Mining Company.	.....	.....	.....	.....	.....	.....	18	2,254	2,272	2,272 10	.....	Royalty paid in full to State treasurer.
Palmetto Phosphate River Mining Company.	.....	.....	.....	.....	.....	.....	.....	378	378	378 16	.....	Royalty paid in full to State treasurer.
Total	1,989	17,655	22,502	45,777	57,716	67,969	81,912	126,569	422,092	$326,686 30	$49,241 46	The difference between..... $422,092 And ..... 326,686 $95,406 Is made up of royalty due... 49,241 And one-half the product of the Oak Point mines not subject to royalty..... 46,165 $95,406

162 All of the companies have paid the royalty due except the Marine and River Company.

From an examination of the returns it was ascertained that this company was indebted to the State for the year ending October 1, 1876, in the sum of $24,967.65.

In the spring or early in the summer of this year the company virtually changed hands, the largest corporators selling their shares, and new officers were elected. Under the instructions of the legislature, I pressed for the collection of the amount due the State, and the officers of the company expected to raise the necessary funds to meet this and other obligations by additional assessment upon the stockholders, and a meeting of the stockholders was called for that purpose in October, but failed to adopt the proper measures.

The company has failed to pay royalty for the year ending October, 1877, the amount of which is $24,273, making a total due by that company of $49,241. The bond of $50,000 given for payment of royalty is worthless, and the assets of the company are not sufficient to liquidate the debt; but the debt due the State for royalty is, I think, due by those to whom the State granted the license and with whom the contract for royalty was made by the act of
163 1870. As among the grantees are gentlemen of undoubted responsibility, I recommend that proceedings be instituted to recover the debt.

As the license to the grantees named in the act and their associates was upon the express condition of the payment of royalty, and the condition has been broken by them, I recommend that the license be revoked by repeal of the act of 1870.

There was an amount of $649 due by the South Carolina Phosphate and Phosphatic Mining Company which had not been paid to the treasurer at the time it became due. Its payment had been withheld by the company owing to the unsettled condition of public affairs at the time and uncertainty as to the proper parties to whom it should be paid. On bringing the matter to the attention of the company it was promptly paid.

One of the important questions connected with "the rights and interests of the State" is whether the amount fixed as royalty is sufficient. At the rates at which the rock is now sold the royalty is about $\frac{1}{6}$ of the value of the ton, or about 16 per cent. There are so few standards of comparison that it is difficult to speak positively on the subject. From the information I have obtained I am of opinion that the present royalty is fair both to the State and to the companies; but if the price of the rock should materially advance, so that what is now worth $6 or $7 per ton should sell for $10 or $12, the present royalty of $1 per ton would not be just to the State.

But here, again, the improvident character of the previous legislation embarrasses, if it does not defeat, all measures for the protection of the State. Unless the same royalty is exacted from all,
164 there will be discrimination by the State in favor of some as against other companies; and whether the State can alter the terms of the license granted to the unincorporated companies is, as I have already indicated, a matter of *graet* doubt.

The 3rd section of the joint resolution referring the subject to me provided that "all necessary expenses incurred by the attorney general should be paid out of the commissions upon the amounts recovered," and "if such commissions should be insufficient, then from the contingent fund of the attorney general or from the phosphate royalty unappropriated.

The expenses incurred for clerical assistance in tabulating the returns of the custom-houses at Charleston and Beaufort, the expense of obtaining copies of the returns from Beaufort, and the expense of a stenographer in taking the testimony of the several witnesses examined amounted to $256.68.

As the only amount recovered by me for the State was $649, it will be readily perceived that the "commissions" would not defray the expenses. Under the authority of the resolution the expenses were defrayed out of the amount recovered and the net balance has been paid over to the treasurer. His receipt and the vouchers for the expenses are on file in this office.

Respectfully submitted.

JAMES CONNER,
Att'y General.

Filed 29th June, 1891.

165 XXIII.

Trial of Cause.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

THE STATE OF SOUTH CAROLINA *ex Relatione* B. R. TILLMAN, Governor; Y. J. Pope, Attorney General; W. H. Ellerbe, Comptroller General; George H. Walter, and J. D. Montgomery, Constituting the Board of Phosphate Commissioners, Complainants,
against
THE COOSAW MINING COMPANY, Defendants.

At a circuit court of the United States begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1891, this cause came up for hearing on June 4th, 5th, and 6th, before the Honorable Melville W. Fuller, Chief Justice, and Honorable Charles H. Simonton, United States judge for the said district, on motion to remand cause to State court, &c., when the following proceedings were had:

The pleadings were read to the court. Arguments were made by Messrs. Y. J. Pope, attorney general; George S. Mower, and Robert Aldrich, on behalf of complainants, and by Messrs. A. T. Smythe, Edward McCrady, Jr., Thomas W. Bacot, and A. M. Lee, on behalf of defendants, and by Mr. H. A. M. Smith in reply for complainants, when the court took the case under advisement.

166 XXIV.

Agreement of Counsel.

To the Honorable M. W. Fuller, Chief Justice, and Honorable C. H. Simonton, district judge:

It is hereby agreed that the hearing in the manner and form as had before the chief justice and Judge Simonton in Charleston shall be taken as a hearing on the merits.

It being distinctly understood, however—

1. That the answer of the defendants is not to be taken as having the technical effect of an answer on a hearing in equity on bill and answer alone, but only such effect as a sworn statement on behalf of the defendants should have on a motion for a preliminary injunction as against a sworn bill or affidavit for complainant.

2. The affidavit of Mr. Gayer read before the chief justice and Judge Simonton to be included in the record, subject to defendants' objection; the opinion of Attorney General Conner given in December, 1877, also to be included in the record.

3. The opinion of Edward McCrady, Sr., given in 1875, and the agreement referred to in the 14th article of the answer to be included in the record.

4. The opinion of Edward McCrady, Sr., given in 1884 to the Coosaw Mining Company not to be included in the record, but to be used by defendants' counsel, if they see fit, in argument, as was done at the hearing in Charleston.

This understanding to be included as part of the record.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Counsel for the Coosaw Co.
Y. J. POPE, *Att'y Gen'l,*
P'r MITCHELL & SMITH, *Of Counsel.*

Charleston, S. C., July 10th, 1891.

Filed July 10th, 1891.

167 XXV.

Opinions.

Two motions have been argued:

1. To remand.

2. To continue the order granting a preliminary injunction and appointing a receiver.

My conclusions are (1) that upon the face of this record the motion to remand ought not to be entertained. The question of jurisdiction was adjudicated by this court on the 21st of April, 1891, and cannot be re-examined at this stage of the proceedings; but if the question were open the result would be the same, as I concur in the opinion of the district judge, filed herein April 21, 1891. 45 Fed. Rep., 804. The motion to remand is therefore overruled. (2), as to the motion to continue, &c. The contention of the defendant is

that it has, by contract with the State in virtue of the act of 1876, the exclusive right to mine all the phosphate rock within a defined part of the Coosaw river for all time at a royalty of one dollar per ton. The defendant carried on its mining operations prior to 1876 in the particular locality under an act of 1870, which gave the right to mine for the full term of twenty-one years, at one dollar per ton. The act of 1876 made this right exclusive, and, it is argued, perpetual, because it was provided that defendant (as well as other companies) should have that right "so long as and no longer than" it should make the returns and pay the royalty prescribed. The royalty thus referred to was fixed by the act of 1870.

It was decided in State *vs.* Pacific Guano Company, 22 S. C., 50,
168 that the rule of construction applicable to the right to mine in the beds of navigable streams containing phosphate deposits is the ordinary one in the instance of grants of public rights, namely, that the grant is to be construed strictly in favor of the State and against the grantee. I concur in that view, and applying the rule here it forbids the conclusion that the legislature intended an indefinite grant by the terms used. The act of 1876 must necessarily be read in connection with that of 1870, and, this being done, it seems clear that the duration of the exclusive right as claimed was not thereby enlarged. This conclusion is strengthened by an examination of the many acts in relation to phosphate mining referred to on the hearing of this motion, which show the policy of the State to have been to limit the duration of the right to mine, a policy which it cannot be properly held the State intended to depart from by the act of 1876. It follows that the claim of the defendant to the exclusive right to mine within the mentioned territory indefinitely at one dollar per ton cannot be sustained. (3) This being so, and in view of the provisions of the act of 1890, an injunction ought to go against the defendant, restraining it, as prayed, until it shall take out a license under the latter act and otherwise comply therewith, and such an order may be substituted for the order made by the State court, which should be vacated so far as inconsistent with the order so entered. (4) Pending the filing of the foregoing memorandum and the entry of the order therein referred to, the parties having agreed to submit the case on the hearing already had, as on the merits, and their stipulation in that behalf having been duly considered, a final judgment and decree may be entered in accordance with the result above indicated.

MELVILLE W. FULLER,
Chief Justice.

3rd August, 1891.

169 SIMONTON, *J.*, concurring:

The acts of 1870 and 1876 must be construed *in pari materia.*

Under the first act the State gave the grantees for twenty-one years the right to mine in its navigable streams. This grant was upon the condition that the grantees should pay annually one dollar a ton on each ton dug and mined, and that they should make a re-

turn of their operations annually or oftener if required. This was not an exclusive right (Bradley *vs.* The Phosphate Co., 1 Hughes). It was upon condition—that is to say, it existed so long as and no longer than the conditions were fulfilled.

The act of 1876 proposed modifications of this contract in four particulars:

1. The time for making the returns was definitely fixed—the end of each month. This was an advantage to both parties.

2. The royalty was made payable on each ton dug, mined, and shipped, not on the rock mined. This was in favor of the grantees.

3. The royalty was made payable quarterly, not annually. This provision to go into effect immediately, and the royalty for the two quarters of the current year to be paid at once. This was in favor of the State.

4. The right to mine, theretofore not exclusive, was made exclusive upon the acceptance of the State's proposals.

The original contract was unchanged in every other respect. The royalty remained the same—one dollar per ton. The grant was wholly on condition—that is, "so long as and no longer than" the conditions were fulfilled. The duration of the grant during which these conditions were of force was unchanged twenty-one years from 1870.

This is a reasonable construction of a doubtful act by which the doubt is resolved in favor of the sovereign grantor. It is a familiar rule of construction that when a statute operates as a grant of public property to an individual or the relinquishment of a
170 public interest and there is a doubt as to the meaning of its terms or as to its general purpose, that construction will be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. (Field, J., in Slidell *vs.* Grandjean, 111 U. S., 437.)

3rd August, 1891.

171 (*Annexed to the Foregoing Opinions.*)

TACOMA, WASHINGTON, *July 20th*, 1891.

DEAR JUDGE: Your letters were reforwarded to Chicago and thence here. I send the memorandum to be filed and proceeded upon if you choose and have not already acted.

My supposition is that the parties will stipulate or agree that an appeal be prayed at once, the cause be docketted, and a motion made to advance. Of course, it could be submitted on printed briefs under the rule, but I assume counsel would like to argue it orally, and perhaps the court would advance it if the motion were made comparatively early in the term.

I have none of the briefs, &c., here, and can make no special suggestion as to form of decree. My address at Chicago will be care of Gregory, Booth & Harlan, 150 Dearborn St., until I return, along the first of August, when it will be 3600 Lake avenue.

Very truly yours, M. W. FULLER.

Hon. Chas. H. Simonton, Charleston.

172 XXVI.

Decree.

This cause having come on to be heard on the final hearing on the merits under the stipulation and agreement of the parties hereto in writing and duly filed in the cause, after argument of counsel thereon and upon consideration thereof, it is ordered, adjudged, and decreed—

1. That the grant or privilege of digging, mining, and removing phosphate rock and phosphatic deposits from the navigable streams of the State of South Carolina given to the defendants under the act of assembly of 1870, mentioned in the pleadings, for the period of twenty-one years from the passage of the said act, at a royalty of one dollar per ton, became and was, under the provisions of the act of 1876, an exclusive grant or privilege of digging, mining, and removing such deposits from the bed of Coosaw river, at the royalty aforesaid, upon the conditions and within the limits mentioned in said last-named act, for the remainder of said period of twenty-one years and no longer; that such grant or privilege in said defendants has now ceased and determined.

2. That the defendants, The Coosaw Mining Company, and all persons claiming under them and the servants, agents, and employees of them, be, and each and every of them are, forever restrained and enjoined from in any way claiming or attempting to claim any right, title, interest, estate, or grant under or by virtue of said act or acts in or to the phosphate rock or phosphatic deposits in the bed of Coosaw river, in the State of South Carolina, and from digging, mining, or removing, or attempting to dig, mine, or remove, the same or part thereof.

3. That nothing in this decree contained shall be construed to enjoin the said defendant, The Coosaw Mining Company, from hereafter mining in the bed of the said Coosaw river when thereunto duly authorized under any law of the State of South Carolina.

173 4. That U. R. Brooks, the receiver heretofore appointed under the order of the State court, be discharged from his receivership, and that the plaintiffs pay to him the sum of one hundred and twenty-five dollars, hereby adjudged to be a reasonable compensation to him as such receiver.

5. That the defendants pay the costs of the marshal and clerk and, with this exception, each party pay their own costs.

16th September, 1891.

CHARLES H. SIMONTON,
U. S. Judge.

The chief justice authorizes me to say that he unites and concurs in this order and decree.

CHARLES H. SIMONTON.

Filed 16th Sept., 1891.

174 XXVII.

Petition of Defendants for Allowance of Appeal and Order Thereon, with Assignment of Errors Annexed.

The above-named defendants, appellants, The Coosaw Mining Company, conceiving themselves aggrieved by the order or decree entered on the 16th day of September, 1891, in the above-entitled proceeding, do hereby appeal from said order or decree to the Supreme Court of the United States and pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order or decree was made, duly authenticated, may be sent to the Supreme Court of the United States; and they file herewith an assignment of errors, which are intended to be urged on the hearing of said appeal.

Charleston, S. C., Oct. 6th, 1891.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Attorneys for Defendants, Appellants,
The Coosaw Mining Company.

175 And now, to wit, on this sixth day of October, A. D. 1891, it is ordered that the said appeal be allowed as prayed for, and that a citation do issue in accordance therewith, returnable on the fifth day of November, in year of our Lord eighteen hundred and ninety-one. Let the appellant also enter into bond within ten days from this date, with security to be approved by one of the judges of this court, in the sum of two hundred and fifty dollars, conditioned to pay all costs which may accrue on the said appeal.

6th October, 1891.

CHARLES H. SIMONTON,
U. S. Judge.

176 *Assignment of Errors.*

Assignment of errors of The Coosaw Mining Company, defendants, appellants, to the opinions and the order or decree of the court in this suit.

And now come The Coosaw Mining Company, defendants, appellants, in the above-entitled suit, and, for the purpose of an appeal to the Supreme Court of the United States from the order or decree of this court and from the opinions rendered herein, assign the following errors, separately and particularly asserted and intended to be urged, to wit:

To the opinion filed by his honor the chief justice:

1. That his honor erred in holding that the decision in the case of The State *vs.* The Pacific Guano Company was applicable to the grant of 1876, under consideration in this suit.

2. That his honor erred in holding that the grant (namely, that under the act of 1876) is to be construed strictly in favor of the State and against the grantee.

3. That his honor erred in holding that a proper construction of the act of 1876 forbids the conclusion that the legislature intended an indefinite grant by the terms used.

4. That his honor erred in holding that the act of 1876
177 must necessarily be read in connection with that of 1870.

Whereas it is respectfully submitted that this should only be done where the latter act itself is silent or doubtful as to the point to be construed, inasmuch as reference to a former act is only permitted to settle a doubt and not to raise one. The duration of the tenure in the act of 1876 when read by itself admits of no doubt.

5. That his honor erred in holding that the act of 1876, even when read in connection with the act of 1870, did not enlarge the duration of the exclusive right granted by the act of 1876 to the defendants.

6. That his honor erred in holding that the policy of the State was to limit the duration of the right to mine; that as a matter of fact this was error, and as a matter of law it could not control the construction of the act of 1876 had it been true as a matter of fact.

7. That his honor erred in holding that the claim of the defendant to the exclusive right to mine continuously within the mentioned territory cannot be sustained.

8. That his honor erred in holding that an injunction could be granted in this action, whereas the complainant has failed to show any case entitling it to invoke the equitable jurisdiction of the court.

To the opinion filed by his honor the district judge:

1. That his honor erred in holding that the grant in the act of 1870 was "upon the condition that the grantees should pay annually one dollar a ton on each ton dug and mined, and that they should make a return of their operations annually or oftener if required," whereas such were not the conditions imposed by the said act.

178 2. That his honor erred in holding that the only modifications of the act of 1870 made by the act of 1876 were in the four particulars stated in his opinion, whereas an inspection of the two acts shows other material modifications.

3. That his honor erred in holding that the original contract was unchanged in every respect except those enumerated by him.

4. That his honor erred in holding that the grant (that of 1870) was wholly on condition—that is, "so long as and no longer than" the conditions were fulfilled.

5. That his honor erred in holding that the duration of the grant (of 1870) was unchanged by that of 1876.

6. That his honor erred in holding that all doubts in the grant of 1876 should be construed in favor of the State and as against the defendant.

7. That his honor erred in holding that the act of 1876 was of such a doubtful character that a reasonable construction should resolve it in favor of the sovereign grantor.

8. That his honor erred in holding that the acts of 1870 and 1876 must be construed *in pari materia*, whereas it appears from the

record that the act of 1876 was a general and public act and applicable to and accepted by many persons who neither had nor claimed any rights under the act of 1870.

To the order *of* decree of the court:

1st. That the court erred in ordering, adjudging, and decreeing that the grant or privilege of digging, mining, and removing phosphate rock and phosphatic deposits from the navigable streams of the State of South Carolina given to the defendants under the act of assembly of 1870, mentioned in the pleadings, for the
179 period of twenty-one years from the passage of the said act at a royalty of one dollar per ton became and was, under the provisions of the act of 1876, an exclusive grant or privilege of digging, mining, and removing such deposits from the bed of Coosaw river at the royalty aforesaid upon the conditions and within the limits mentioned in said last-named act for the remainder of said period of twenty-one years and no longer; that such grant or privilege in said defendants has now ceased and determined.

Whereas it is respectfully submitted that under the act of 1876 the defendants, having accepted the terms thereof, have the continuing right to mine in the said Coosaw territory so long as and no longer than they comply with the conditions of the said act.

2. That the court erred in holding that the act of 1876 must be construed and limited by the act of 1870, whereas it appears by the record that the act of 1876 was a general and public act and applicable to and accepted by many persons who never had or claimed any rights under the act of 1870.

3. That the court erred in ordering, adjudging, and decreeing that any injunction could or can be granted in this action, whereas it is respectfully submitted that the complain-t has failed entirely to show cause of action entitling it to invoke the equitable jurisdiction of the court, and the bill should therefore be dismissed.

The appellants further assign as error the introduction by the appellees on the trial of this cause in the circuit court as evidence the affidavit of William J. Gayer, and hereby renew their exception taken at the time to such introduction.

180 And to the opinion filed by his honor the chief justice, because his honor the chief justice erred, in that he held as follows:

"This conclusion is strengthened by an examination of the many acts in relation to phosphate mining referred to on the hearing of this motion, which show the policy of the State to have been to limit the duration of the right to mine, a policy which it cannot be properly held the State intended to depart from by the act of 1876."

Whereas his honor should have held that the alleged policy of a State is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.

Charleston, S. C., 6th October, 1891.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Att'ys for Defendants, Appellants, The Coosaw Mining Company.

Filed 6th Oct., 1891.

181 XXVIII.

Bond.

Know all men by these presents that we, the Coosaw Mining Company, by their chief manager, J. E. Adger, and their sureties, Theodore D. Jervey and J. B. E. Sloan, are held and firmly bound unto the State of South Carolina in the penal sum of two hundred and fifty dollars; to which payment, well and truly to be made and done, we bind ourselves and each and every of our heirs, executors, and administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Charleston this sixth day of October, anno Domini eighteen hundred and ninety-one, and in the one hundred and sixteenth year of the sovereignty and Independence of the United States of America.

The condition of the above-written bond or obligation is such that whereas an appeal has been allowed to the above-named Coosaw Mining Company, defendant herein, from the final order or decree of the court in this action entered on the sixteenth day of September, 1891, to the Supreme Court of the United States:

Now, if the above-named Coosaw Mining Company, Theodore D. Jervoy, and J. B. E. Sloan or either of them, their or either of their certain attorneys, executors, or administrators, should pay to the said State of South Carolina, the complainants in this action, all costs which may accrue on the said appeal if it shall be finally determined that the said Coosaw Mining Company is not entitled thereto, then this obligation shall be void and of none effect; otherwise to remain in full force and virtue.

J. E. ADGER, [SEAL.]
Chief Manager.
THEO. D. JERVEY. [SEAL.]
J. B. E. SLOAN. [SEAL.]

Signed and sealed in the presence of—
GEO. H. MOFFETT.

182 STATE OF SOUTH CAROLINA, }
County of Charleston. }

Theodore D. Jervey and J. B. E. Sloan, above named, being duly sworn, say each for himself that he is worth the amount of the above bond, to wit, the sum of two hundred and fifty dollars, over all his debts and liabilities and exclusive of property exempt from execution.

THEO. D. JERVEY.
J. B. E. SLOAN.

Sworn to before me this 6th day of October, A. D. 1891.
GEO. H. MOFFETT,
[SEAL.] *Notary Public for S. C.*

Approved.
CHARLES H. SIMONTON,
U. S. Judge.

10th Oct., 1891.

Filed 12th October, 1891.

183 XXIX.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To the State of South Carolina *ex relatione* B. R. Tillman, governor; Y. J. Pope, attorney general; W. H. Ellerbe, comptroller general; George H. Walter, and J. D. Montgomery, constituting the board of phosphate commissioners of the State of South Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of October, 1891, pursuant to an appeal filed on the 6th day of October, 1891, in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein The Coosaw Mining Company are appellants and The State of South Carolina *ex relatione* B. R. Tillman, governor; Y. J. Pope, attorney general; W. H. Ellerbe, comptroller general; George H. Walter, and J. D. Montgomery, constituting the board of phosphate commissioners, are appellees, to show cause, if any there be, why the order or decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf. The said appeal and this citation are hereby made returnable on the fifth day of November, A. D. 1891.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of October, A. D. 1891.

CHARLES H. SIMONTON, *U. S. Judge.*

Service of the above citation acknowledged and copy received this 17th October, 1891.

Y. J. POPE, *Att'y Gen'l,*
P'r MITCHELL & SMITH.

Filed 17th Oct., 1891.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

184 XXX.

Certificate of Clerk.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

I, J. E. Hagood, clerk of said court, do hereby certify that the foregoing is a true and correct copy of all the records and proceed-

ings in the case of The State of South Carolina *ex relatione* B. R. Tillman *et al.*, complainants, against The Coosaw Mining Company, defendants, rendered as aforesaid, together with all things relating to the same, as appears by the records now on file in my office.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, S. C., this 24th day of October, A. D. 1891.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: Case No. 14,922. South Carolina C. C. U. S. Term No., 1448. The Coosaw Mining Company, appellant, *vs.* The State of South Carolina *ex rel.* B. R. Tillman *et al.* Filed November 2nd, 1891.

Office Supreme Court U. S.
FILED.
MAR 7 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

TERM NO. 1448.

APPEAL FROM U. S. CIRCUIT COURT FOR DISTRICT OF SOUTH CAROLINA—IN EQUITY.

THE COOSAW MINING COMPANY, APPELLANTS, 1

vs.

THE STATE OF SOUTH CAROLINA *ex relatione* B. R. TILLMAN, *et al.*, APPELLEES.

BRIEF OF ARGUMENT ON BEHALF OF APPELLANTS AGAINST THE JURISDICTION OF THE COURT BELOW. 2

The Appellants interpose objection to the jurisdiction of the Court below upon the ground that there is adequate remedy at law.

I.

Can such objection be now interposed?

The Supreme Court of South Carolina holds that an objection to the jurisdiction of the Court below, although 3
raised for the first time in the Supreme Court, must be

considered and determined. State *v.* Penny, 19 So. Ca. Rep., 218. And a question of jurisdiction may be raised at any time. Segler *v.* Coward, 24 So. Ca. Rep, 119.

See, also—

Poole *v.* Brown, 12 So. Ca. Rep., 558.

This Court holds likewise :

4 Meyers' Fed. Decisions, Vol. 15, Sec. 890.
Hipp *v.* Babin, 19 Howard, 271.
Metcalf *v.* Watertown, 128 U. S., 586.
Parker *v.* Ormsby, 141 U. S., 81.

In the last case (at page 86) this Court says:

"The motion to dismiss the appeal necessarily assumes that it was competent for the appellants, by their acts, or by failing to act, to waive the question of the jurisdiction of the Circuit Court. This is an error. We said, in Metcalf *v.* Watertown, above cited, that whether a Circuit Court of the United States had or had not jurisdiction in a case brought here, upon error or appeal, is a question that this Court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its
5 merits."

See also Metts *v.* Piedmont and Arlington Life Ins. Co., 17 So. Ca. Rep., 120–123.

There are no presumptions in favor of the jurisdiction of the Courts of the United States, *ex parte* Smith, 94 U. S., 455.

II.

As to the jurisdiction of the Court below.

The essential pre-requisite to the jurisdiction of Courts of
6 Equity is that there is no adequate remedy at law—otherwise the constitutional right to a trial by jury would be invaded and taken away.

This fundamental rule has prevailed in England from the inception of equity jurisprudence, and always in the United States—in fact, it was *expressly* adopted by Congress in the 16th Section of the Judiciary Act of 1789, which has been incorporated into the Revised Statutes, as follows:

"Sec. 723. Suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

And this regardless of the code system of some of the
7 States which abolishes the distinction between the forms of legal and equitable proceedings, and allows their union.

The following decisions of this Court are referred to without necessity of comment:—

Hipp *v.* Babin, 19 Howard, 271.
Parker *v.* Winnipiseogee Mf'g. Co., 2 Black, 545.
Grandchute *v.* Winegar, 15 Wallace, 373.
Lewis *v.* Cocks, 23 Wallace, 466.
Ellis *v.* Davis, 109 U. S., 485.
Killian *v.* Ebbinghans, 110 U. S., 568.
Fussell *v.* Gregg, 113 U. S., 550. 8
United States *v.* Wilson, 118 U. S., 89.
Whitehead *v.* Shattuck, 138 U. S., 146.
Scott *v.* Neely, 140 U. S., 106.
Smyth *v.* N. O. Canal and Banking Co., 141 U. S., 656.
And see State *v.* Pacific Guano Co., 22 So. Ca., Rep., 50, 77–8, citing Sullivan *v.* Thomas, 3 S. C. 546.
Also, Linning *v.* Geddes, 1 McCord Ch., 304,

The State of South Carolina cannot because of her sovereignty or otherwise ignore this fundamental rule and proceed at her will by "information in equity"—for, having come into Court "to assert a right of property, she is of course bound by all the rules established for the administration of justice between individuals. This is practically an action for the recovery of real estate, etc." State v. Pacific Guano Co., 22 S. C., 50, 74. 9

And to quote from the same decision, at page 78:—

"Notwithstanding the technical mould in which the case comes to us (information by the Attorney General on behalf of the State, praying, among other things, for an injunction), the substantial character of the controversy here certainly is an action for the recovery of real estate, which is in no respect equitable."

And (at page 86) "its avowed object is to establish the ownership in the soil of the beds" of the streams. The Court therefore held that it was not a case in chancery, but a legal action. 10

As in the said case of the State *v.* Pacific Guano Co., so here the "substantial character of the controversy," the "avowed object" of the action, is the assertion of a right of property—to adopt the language of the opinion of this Court in Whitehead *v.* Shattuck, (a suit to quiet title,) 138 U. S., 146, 151: The right which in this case the plaintiff wishes to assert is her title to certain real property; the remedy which she wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury. 11

To quote from the opinion of this Court in Scott *v.* Neely, 140 U. S., 106,109–10:

"In the Federal Courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency."

And to quote from the opinion of this Court in Hipp *v.* Babin, 19 Howard, 271–277:

12 "The bill in this cause is, in substance and effect, an ejectment bill. The title appears by the bill to be merely legal; the evidence to support it appears from documents accessible to either party; and no particular circumstances are stated, showing the necessity of the Court's interfering, either for preventing suits or other vexation, or for preventing an injustice, irremediable at law."

The Supreme Court of South Carolina, in the recent case of *Hardin vs. Clark*, 32 S. C., 480, 489, says: "Now, while it may be true that these two claims, one legal and the other equitable, might be properly united in the same complaint under the provisions of the Code, yet, as was held in *Adickes vs. Lowry* (12 S. C., at page 108): 'At the trial the
13 legal and equitable issues must be distinguished and decided by the Court in the exercise of its distinct functions as a Court of law and a Court of equity'"

An analysis of the complaint in this case (Record, pages 2–5) shows:

1. That it is an *original* bill for perpetual injunction, not a bill auxiliary to or in aid of a pending action at law.

2. That the plaintiff claims to be the absolute and sole owner of the property in dispute, and therefore has the right to occupy, possess and enjoy the same, but that the defendants (the Coosaw Company) claim a right to the property under the Act of 1876 and have for some time past been in
14 possession of and prevent the plaintiff from occupying or possessing the same. This is the *substance* of the complaint, which "is, in substance and effect, an ejectment bill."

The prayer for a Receiver further emphasizes the fact of *possession* being in *Defendants*, and *not* in *Plaintiff*.

It is true that the plaintiff blends with her said claim the assertion of several equities so as to give to the cause an appearance of a suit in equity. The complaint asserts:

(1.) That the defendants have threatened suits for damages for trespassing on the property, and have begun suits and proceedings for injunction, and will reiterate the same
15 question under a multiplicity of proceedings, unless enjoined and their claim determined in this single cause.

(2.) That the defendants threaten, and are about, by and under their claim, to dig and remove the valuable phosphate rock in the property, and will do so unless restrained, to the irreparable and irremediable injury of the plaintiffs, &c.

(3.) That it is necessary that the question of the defendant's claim should be disposed of and the title of the plaintiffs quieted and established.

(4.) That the cloud upon the plaintiffs' title should be removed and quieted and determined, and prays that the defendants be perpetually enjoined from claiming, or attempting to claim any right, title, interest, estate or grant in the property, &c., and from bringing actions, suits or proceedings at law or in equity, &c. 16

All these are very good equities in the abstract; but let us examine and see whether they are not mere assertions, without foundation to rest upon, so as to give an equitable color to the action.

(1.) As to multiplicity of proceedings. 17

The record shows that the appellants had begun but two suits, and them in the United States Circuit Court for South Carolina—that said two suits anticipated this suit, and that this suit was brought by the appellees in the State Court to avoid, if possible, the jurisdiction of the United States Court in said two suits. (Record pages 50-51.)

But, however, the equity of multiplicity of proceedings does not mean several pending proceedings by one and the same party, but by different parties. Roebling vs. First Nat. Bank, 30 Fed. Rep., 744. Multiplicity of proceedings by one and the same party can only be enjoined when there has actually been one or more trials previously concluded, or to prevent a single person from reiterating in several successive suits the same claim which he has already unsuccessfully litigated. Foster, §209. 18

The said two suits by the appellants are yet pending and undecided.

The rules governing the action of the Court in such matters are clearly laid down in Holland vs. Challen, 110 U. S., p. 19, as follows:

"A bill of peace against an individual *reiterating an unsuccessful claim* to real property would formerly lie, only where the plaintiff was in possession, and his right had been successfully maintained. The equity 19

of the plaintiff in such cases arose from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded on a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action, or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action.

"Thus the party in possession, though successful in every instance might be harassed and vexed, if not ruined, by a litigation constantly renewed To put an end to such litigation, and give repose to the successful party, Courts of Equity interfered and closed the controversy..

"To entitle the plaintiff to relief in such cases, the concurrence of three particulars was essential: *He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor.* Upon these facts appearing, the Court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed."

And see High on Injunctions, Sections 61, 62, 422, 700.

In the case before the Court the complainant does not allege even that she is in possession of the property, or that such possession has been disturbed, or that her right has been established.

The fact is that the defendants have done nothing except submit the question at issue to the Courts for settlement, and this is now pending, and complainants' right has never been established otherwise than in this proceeding.

There is, therefore, no equity here.

(2.) As to irreparable damage.

The record shows that appellants notified appellees that in consequence of the Act of 1890 they would suspend operations till the question in dispute was judicially settled.

But even if appellants had continued operations, the appellees had recourse against them for damages, there being no allegations or pretence that appellants are insolvent. The fact is they are abundantly solvent. Upon one recovery of damage they might then have asked for injunction, but not before.

There is no charge that appellants are digging rock, but only an assertion that they threaten, and about to do so, and will do so unless restrained.

Mere apprehension of a threatened wrong (which is all that is here alleged) is not enough. 10 Am. and Eng. Encyclopædia of Law, *page* 783, also, High on Injunctions, § 36. Nor will an injunction be granted or continued in the face of assertion by defendant that he does not intend to do a certain act.

High on Injunction, § 11.

10 Am. and Eng. Encyc. of Law, *page* 783.

Equity cannot be invoked to restrain a consequential injury necessarily resulting from the lawful exercise of a right granted by the sovereign power of the State *Ib*, 783.

Moreover, the object and purpose of the contract in the Act of 1876 being the occupation of the Coosaw River by the appellants and the digging, mining and removing of phosphate rock and phosphatic deposits therefrom by them, how can their use of the property in the mode agreed upon by the contract be called irreparable damage, or waste, or 24
destructive trespass?

It is impossible "*to conceive how the Company can commit waste and spoil by using the property in the mode agreed on by the contract.*"

Capner vs. Flemington Mining Co., 3 N. J. Eq., 467.

And, too, the plaintiff actually alleges, in the 9th paragraph of the Complaint that the mining and removal of the said phosphate rock and phosphatic deposits is of great importance—and yet asserts in the 5th paragraph of the 25
Complaint that such mining and removal is irreparable and irremediable injury!

So that, while there is *allegation* of irreparable injury, there is no fact stated showing or tending to show that there *is* such injury.

It is not a case of irreparable damage to the complainants—but only of keen disappointment to other and rival phosphate companies.

(3 and 4.) As to cloud on title, and quieting and establishing title.

The foundation of these equities is *possession* by the 26
plaintiff, and that his claim has been *established at law* at least once.

2 Story's Equity Jurisprudence §825 to §860.
3 Pomeroy's Equity Jurisprudence, §1393 to §1399
Frost *v.* Spitley, 121 U. S, 556.
Whitehead *v.* Shattuck, 138 U. S., 146.

In South Carolina the general equity rule prevails—there is no statutory provision on this subject.

Besides, if there be any cloud on title in this case, it was created by the State herself by the Act of 1876.

The cases in the Supreme Court of the United States are 27
numerous, and all decide that to maintain such a suit the

plaintiff must be in possession of the property, and his title must have been clearly established at law. We quote from the case of Holland vs. Challen, 110 U. S., p. 20, as follows:

"A bill, *quia timet*, or to remove a cloud upon the title of real estate, differed from a Bill of Peace in that it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the Court was invoked because the party feared future injury to his rights and interests. Story's Equity, §826. To maintain a
28 suit of this character it was generally necessary that the *plaintiff should be in possession of the property*, and, except where the defendants were numerous, *that his title should have been established at law or be founded on undisputed evidence or long continued possession*. Alexander vs. Pendleton, 8 Cranch, 462; Peirsoll vs. Elliott, 6 Pet., 95: Orton vs. Smith, 18 How., 263."

An examination of these authorities leads us to the following conclusions:

First. That before filing a Bill for injunction on the ground of multiplicity of suits the plaintiff must be in possession of the property, his title must have been established at law, and
29 the suits of which he complains must be numerous, directed against him, and evidently brought simply for the purpose of harrassing and annoying him.

None of these facts exist in this case.

Second. That the mere number of suits pending is of itself no ground for jurisdition. An objection of this character is properly made by a motion to consolidate, addressed to the the Court in which the suits are pending.

Third. That in order to sustain a bill upon the ground of removing the cloud on the title, it is necessary that the plain-
30 tiffs should be in possession of the property, and that his title should have been established or demonstrated to the Court beyond shadow of doubt.

Fourth. Inasmuch as the suits complained of in the present case are two cases pending in this Court and the injunctions referred to in the bill of the complainants have been granted by this very Court, the pendency of such proceedings and such injunctions furnish no ground of equity to the complainants to come into Court and ask for an injunction of the proceedings so pending.

31 *Fifth.* That even if the Court should consider that the allegations in reference to the removal of the cloud on the

title or the multiplicity of suits were entitled to any consideration, such allegations could have no effect whatsoever on the question of enjoining the continued operations of the defendants, but go only to enjoin the proceedings so instituted by them An injunction and Receiver, preventing their continued possession of and operations in the territory in question, must depend upon other and entirely different allegations, and if granted is on other and entirely different grounds.

No such allegations and no such grounds are set out in the 32
bill.

Possession by the *Plaintiff* is also necessary in cases of *trespass* other than trespass to try title or ejectment.

As to Injunction.

As decided in State *v.* Pacific Guano Co., above referred to, an information in equity praying for injunction cannot make the cause a suit in equity.

This is not a suit in equity auxiliary to or in aid of an action at law—nor is there any allegation or even pretence of insolvency of the appellants. 33

See 10 Am. and Eng. Encyclopedia of Law, p. 799.

An injunction will be refused when the complainant has an adequate remedy at law—nor will it be granted where the right is doubtful—and a court will grant a perpetual injunction only when a party shows a *clear* right thereto.

Ibid, pp. 784 and 785.

The injunction prayed for in this case has no substantial equities to justify it as above shown.

An injunction cannot issue unless an action at law for 34
the determination of the title or legal right is at least pending.

Kerr on Jurisdiction, §197.

This suit is an *original* one—so that an injunction could not issue herein, even if the equities stated were substantial.

It may be said, however, that an injunction was granted in the case of State *v.* Pacific Guano Co.

But the question whether or not injunction could properly be granted was not raised in that case, an injunction issuing 35
upon the consent of both sides.

Furthermore—that action was under the Code system which permits the blending of legal and equitable remedies, so that the injunction therein granted might be said to have been in aid of the legal action therein also blended and involved.

Nor does the Act of 1890 help this bill. The provisions of that Act merely authorized the Board of Phosphate Commissioners to invoke such relief by injunction or otherwise
36 as was proper. It did not confer or enlarge in any way any existing rights or remedies.

"The process of injunction should be applied with the utmost caution. The interference rests on the principle of a *clear and certain* right to the enjoyment of the subject in question, and an injurious interruption of that right which, on just and equivalent grounds, ought to be prevented."

10 Am. and Eng. Encyc. of Law, 780.
Story's Eq. Jurisprudence, § 959 a and b.
Coffeen vs. Brunton, 5 McLean, 261.

37 "Where defendants have been in possession of the mine for several months, have expended large sums of money in developing and working it, and are at the time of the application, and had been for some time immediately prior thereto, working the same as their own, it requires a very clear and strong showing to induce the Court to enjoin the work; there must be an urgent necessity, and as a general rule *the title and right* of plaintiff must be shown to be *clear, well established and not in dispute*." Real Del Monte Consol. G. and S. Min. Co., vs. Pond G. and S. Min. Co., 23 Cal., 82; Field vs. Beaumont, 1 Swanst, 204. See Capner vs. Flemington Min. Co., 3 N. J. Eq., 467.

15 Am. and Eng. Encyc. of Law, page 607.
See also *French vs. Brewer, 3 Wallace, Jr., 357.*
High on Injunctions, § 695.
38 *West vs. Walker, 3 N. J. Eq. 279.*
Vanzwinkle vs. Curtis, 3 N. J. Eq. 422.
Shreve vs. Black, 4 N. J. Eq. 177.

The *clear* and *certain* title of the plaintiff in such cases means, of course, *complete* title—not legal or paper title, mere color of title. As is well said in the case of Tutt vs. Port Royal and Augusta Railway Co., 16 So. Ca., Rep. 365. 368:

"Mr. Blackstone says that a complete title to land consists of three things:—1st. possession; 2d. right of possession; and 3d. right of property. These elements are all necessary to make out complete
39 title, and when they are united in the same person he may be regarded as the complete owner of the property. But they may exist separately; possession may be in one, while the right of possession

may be in another, and the right of property still in another. So it does not follow always that the right of property or a fee simple title carries with it the right to immediate and personal possession."

Equity will not permit its remedies to be used to turn out one who is in possession. *People vs. Simonson*, 10 Mich, 335. Nor to prevent one, who is in possession and claiming title, from reaping the legitimate fruits of possession. *Bell vs. Chadwick*. 71 No. Ca., 329, and *Baldwin vs. York*, Id., 463.

Even if neither party be in possession, the Court will not interfere by injunction. 40

St. Louis K. C. & C. R'y Co. *vs.* Dewees, 23 Fed. Rep., 691.

As to adequate remedy at law.

The appellees have plain, adequate and complete remedy at law:

(1.) By action to determine and establish the disputed right to the property.

(2.) Under the General Statutes of South Carolina, as follows: 41

"SEC. 65. Every person or corporation, who shall dig, mine or remove any phosphate rock or phosphate deposit from the beds of the navigable streams and waters of the State without license therefor, previously granted by the State, to such person or corporation, shall be liable to a penalty of ten (10) dollars for each and every ton of phosphate rocks or phosphatic deposits so dug, mined, or removed, to be recovered by action at the suit of the State in any Court of competent jurisdiction."

The said penalty of ten (10) dollars per ton being much more than the *gross* market value—and the appellants (both collectively and individually) being abundantly solvent.

(3.) Under the 12th Section of the Act of 1890, which prescribes a penalty of fine and imprisonment for mining without license. And, also, under the 13th Section of said 42 Act, which declares any boats, vessels, marine dredges or other appliances of any person or persons, corporation or corporations, who shall mine without license, forfeited to and the property of the State: and makes it the duty of the attorney general, for and in behalf of the State, to institute proceedings in any Court of competent jurisdiction for the claim and delivery thereof in the ordinary form of action for claim and delivery—relaxing the rules of evidence in such proceedings, and dispensing with the bond or obligations required to be given by parties plaintiff in actions for claim and delivery.

What more plain, adequate and complete remedy at law 43 could be *had?*

We, therefore, submit that the Court below was without jurisdiction, and that the Bill of the Appellees must be dismissed.

EDWARD McCRADY,
EDWARD McCRADY, JR.,
THOMAS W. BACOT,
LOUIS DEB. McCRADY,

McCRADY, SONS & BACOT.

44

AUGUSTINE T. SMYTHE,
A. MARKLEY LEE,

SMYTHE & LEE.

Solicitors for the Coosaw Mining Company, Appellants.

MAR 7 1892
JAMES H. McKENNEY,
CLERK.

CASE No. 14,022.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 1448.

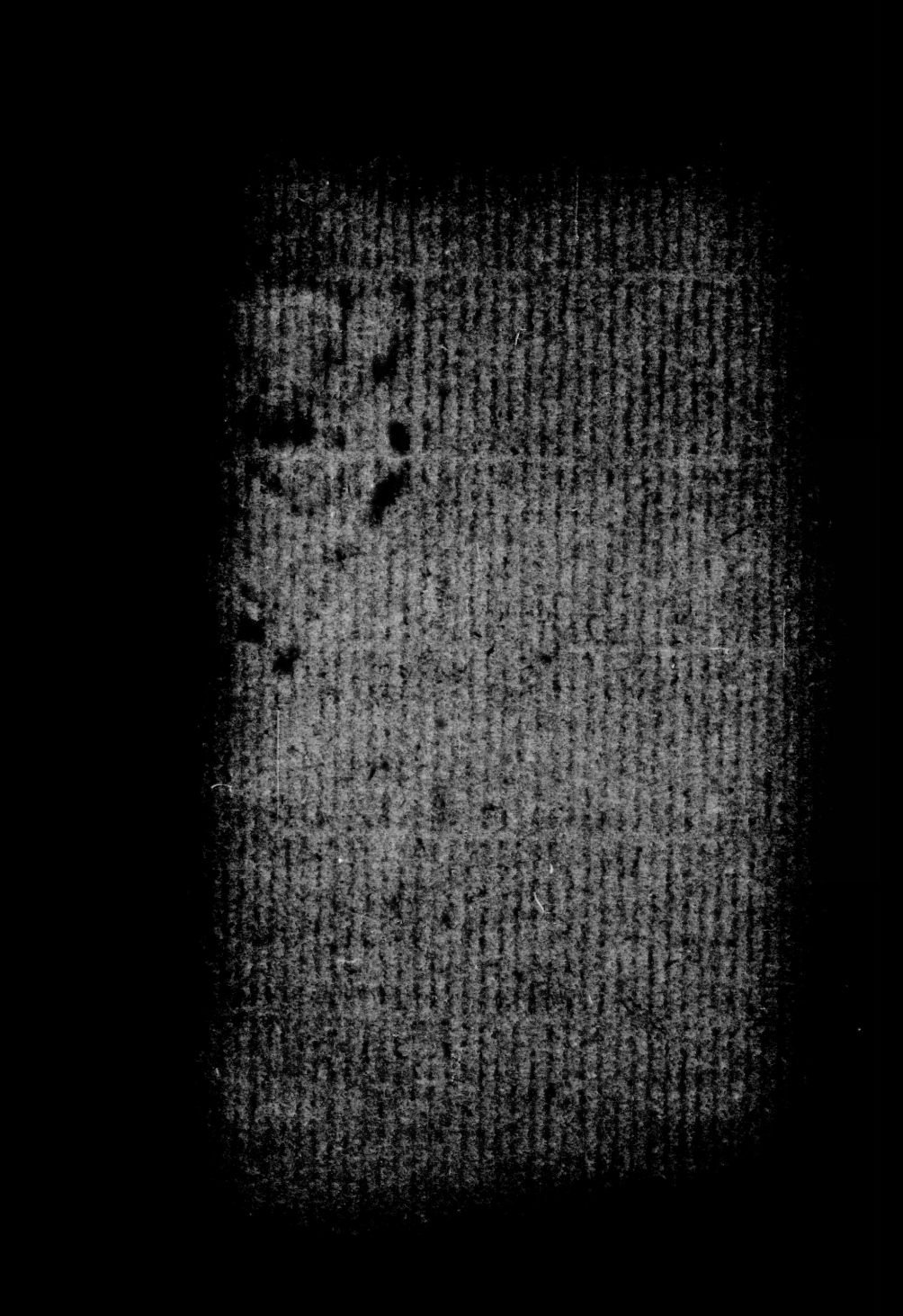
THE COOSAW MINING COMPANY, APPELLANT,

vs.

THE STATE OF SOUTH CAROLINA, EX-RELATIONE B. R. TILLMAN, ET AL., GOVERNOR, CONSTITUTING THE BOARD OF PHOSPHATE COMMISSIONERS OF THE STATE OF SOUTH CAROLINA, APPELLEES.

ARGUMENT SUBMITTED FOR APPELLANTS ON THE MERITS.

McCRADY, SONS & BACOT,
SMYTHE & LEE,
Counsel for Appellant.



IN THE SUPREME COURT OF THE UNITED STATES.

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THE COOSAW MINING COMPANY, APPELLANT,

vs.

THE STATE OF SOUTH CAROLINA, EX-RELATIONE B. R. TILLMAN, GOVERNOR, ET AL., APPELLEES.

1

ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

On the 6th of March, 1891, the Coosaw Mining Company, a joint stock company and mining partnership under the laws of the State of South Carolina, filed their bill in 2
the United States Circuit Court for the District of South Carolina, against the Carolina Mining Company, a corporation of that State, and against B. R. Tillman, Y. J. Pope, W. H. Ellerbee, J. D. Montgomery, Geo. H. Walter and A. W. Jones, setting out that complainants had a contract with the State of South Carolina under an Act of the Legislature approved March 28th, 1876, (printed in full in Record, p. 11, 12,) and that the defendants under the provisions of an Act approved December 23d, 1890, and which was an impairment of the contract with the complainants were 3
trespassing upon the territory in Coosaw River, where the

complainants had the exclusive right to occupy and mine, dig and remove phosphate rock. (Record, page 50.)

The bill prayed an injunction and relief.

On the same day an injunction was issued by the Circuit Court which is still in force.

On the same day the same complainants (the Coosaw Mining Company) filed a second bill against the Farmers' Mining
4 Company and B. R. Tillman and others, to the same effect and with the same purpose as that against the Carolina Mining Company, and a similar injunction was entered and is pending therein. (Record, p. 50.)

On the 21st day of March, 1891, the State of South Carolina *ex-relatione* B. R. Tillman, Governor; Y. J. Pope, Attorney General; W. H. Ellerbee, Comptroller General; George H. Walter and J. D. Montgomery, constituting the board of phosphate commissioners of the State
5 instituted the present proceedings against the appellants (the Coosaw Mining Company) in the Court of Common Pleas for the county of Beaufort in said State, and on the equity side of the Court, alleging that the State was the owner of the beds of all the navigable streams of the State including the Coosaw River, and of all phosphate deposits therein; that the Coosaw Mining Company claimed a continuing grant under the Act of 1876, to occupy and dig, mine and remove phosphate rock from the designated portion of the said river; that the claim of the Coosaw Mining Company
6 was based upon the Act of 1876 and none other; that the said river contained a valuable bed of phosphate rock; that it was of importance to the State that the same should be mined quickly, but that it was necessary that the claim of title set up by the Coosaw Mining Company should be disposed of, and the title of the State be quieted and established; that the relators, acting as a board of phosphate commissioners, had licensed other parties to dig in said river, but were prevented by the defendants, (the Coosaw Mining Company); and asking for perpetual injunction, for
7 temporary injunction, and for a receiver. An answer under oath was *not* waived. (Record, pages 2 to 5.)

On the same date an *ex-parte* restraining order and rule to show cause was made by Judge Aldrich, a Judge of the State Court, at Chambers, returnable on 7th April, 1891, and a temporary receiver appointed to take possession of the Coosaw River Phosphate territory. (Record, p. 6.)

On the 30th of March, 1891, the Coosaw Mining Company filed in the Court of the Common Pleas for the county of Beaufort its petition and bond for the removal of 8
the case to the United States Circuit Court, alleging that its occupation of the said river was under a contract with the State; and that the proceedings of the State through its board of phosphate commissioners was under and in pursuance of the Act of the 23d December, 1890, which was an impairment of the obligations of the contract of the Act of 1876, thereby raising a Federal question. (Record, pages 7 to 14.)

Annexed to this petition as Exhibits A and B are copies of the Acts of 1876 and 1890. (Record, pages 11 and 13.) 9

The removal bond was duly executed and approved by the Clerk of the Court and filed the same day. (Record, page 15 to 16.)

A certified copy of the record was entered and filed in the office of the Clerk of the United States Circuit Court for the District of South Carolina, on the first day of April, 1891. (Record, page 1.)

On the 7th of April, 1891, the Coosaw Mining Company presented their Return to the United States Court in 10
obedience to the provisions of the said order of Judge Aldrich, showing cause why the injunction should not be issued and the receiver appointed. This Return was presented in open Court, in the United States Circuit Court in term time and was filed with the leave of Judge Simonton presiding, and by his order the hearing thereon continued until the 8th day of April, 1891. (Record, pages 18 to 27.)

On the 8th day of April, 1891, the State of South Carolina by her Attorney-General appeared in the United States Court 11
for the purpose only of contesting the jurisdiction of that

Court over the case, and the legality of the attempted removal of the same, from the State Court. (Record, page 27 to 28.)

On the 21st of April, 1891, an elaborate opinion was filed by the United States Circuit Court, Judge Simonton presiding, in which opinion the jurisdiction of the Court, for the reasons therein stated, was sustained. (Record, page 29 to
12 37.) The complaint as originally filed was not remodelled so as to waive answer under oath.

On the rules day in May, 1891, the defendants below, the Coosaw Company, filed their answer *under oath*, denying all the equities of the bill and setting out in full the grounds upon which they claimed a continuing right to mine in Coosaw River. (Record, page 37 to 51.)

Annexed to this answer as Exhibits, A., B., C., and D, are the articles of agreement of the Coosaw Mining Company, the bond given by them under the Act of 1870, the bond
13 given by them under the Act of 1876, and the circular issued by the Board of Phosphate Commissioners, the relators in the Court below, under the Act of 1890. (Record, pages 52 to 58.)

On the 4th of May, 1891, the defendants below, the Coosaw Co., served upon the Attorney-General, notice of a motion, to be made in the United States Circuit Court on the 8th day of May, 1891, to vacate the temporary injunction, and for such other relief as might be proper. (Record, page 58.)

14 On the 1st of June, 1891, the State by her Attorney-General filed replication to the answer of the defendants below. (Record, page 61.)

On the 4th, 5th, and 6th days of June, A. D. 1891, the motion, noticed for the 8th of May, came on to be heard in the United States Circuit Court before the Hon. M. W. Fuller, Chief Justice, and the Hon. Charles H. Simonton, United States Judge. Subsequent to the hearing, the scope of such hearing was changed, from a mere motion to vacate, to a hear-
15 ing on the merits under an agreement of Counsel. (Record, page 103, 104.)

On the 16th of Sept. 1891, a decree was filed by the United States Circuit Court, adjudging that the grant or privilege of digging, mining and removing phosphate rock from the navigable streams of the State, given to defendants below, under the Act of 1870 mentioned in the pleadings, for the period of 21 years, became under the Act of 1876 an exclusive grant or privilege to dig, mine and remove at the same royalty upon the conditions and within the limit mentioned in said 16
last named Act for the remainder of said 21 years and no longer; and that such grant or privilege to said defendants below had ceased and determined—and issuing a perpetual injunction against the said defendants below, from attempting to claim any right, title, interest, estate or grant under or by virtue of said Act, in or to the phosphate rock in the bed of Coosaw River, and from digging, or attempting to dig, the same or any part thereof. (Record, page 107.)

But the decree bears evidence on its face that the Court 17
recognized the propriety of the position assumed by the appellants, and the exceeding doubt as to the title and claim of the State, by expressly refusing to require the appellants (defendants below) to pay the complainants' costs. We come therefore into this Court with the admission of the Court below that it entertained grave doubts in coming to its decision. And this is expressly stated as the opinion of his Honor, the District Judge.

18
On the 6th day of October, 1891, the defendants below, through their counsel, duly presented and filed their petition for allowance of appeal, which was allowed, and the appeal bond duly executed. With their petition was filed an assignment of the errors intended to be urged by them, (the Coosaw Mining Co.) on the hearing of the appeal. (Record, pages 108 to 111.)

On the 6th day of October, 1891, the citation issued, returnable on the 5th of November, 1891. The appeal record was filed in this Court on the 2nd of November, 1891. (Re- 19
cord, pages 112 and 113.)

The question in the case is, whether, under the Act of March 28th, 1876, the appellants (the Coosaw Mining Company), have the continuing right to occupy, and to dig, mine and remove phosphate rock from the designated portion of Coosaw River, so long and no longer than, they make returns and pay the royalty as required by said Act.

20 The assignment of errors is fully set out in the Record, at pages 108 to 110.

The error in reference to the admission of evidence assigned (Record, page 110) is as to the admission of the affidavit of Wm. J. Gayer, found in Record, (page 63,) to the effect that he was intimately acquainted with the late James B. Campbell; and that the said James B. Campbell himself personally informed deponent that he had prepared the draft of the Act passed by the legislature in 1876.

21 The grounds of objection to the introduction of this affidavit are:—

First, that it was *ex parte*; without allowing the defendants below the right to cross-examine the witness and without notice, affording them no opportunity of reply.

Second, because it is mere hearsay, the deponent merely stating what was told him by Mr. Campbell, who was dead at the time of the making out of the affidavit, and long before the suit was commenced.

22 Third, because the Record shows that the Solicitor of the Coosaw Mining Company was Mr. Edward McCrady, Sr. (Record, page 41.)

STATEMENT OF FACTS.

This is an appeal from a decree construing an Act of the State of South Carolina, of 1876, never before construed, entitled:

23 "An Act to settle definitely, the period at which returns shall be made of phosphate rock and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South

Carolina, and the royalty shall be paid thereon, **and also to fix the terms on which the Act** may be **accepted by the parties named therein.**"

In the case of the *United States vs Union Pacific R. R. Co. 91 U. S., 79*, it is said "that Courts in construing a Statute may with propriety recur to the history of the times when it was passed; and that this is frequently necessary in order to ascertain the reason as well as the meaning of particular 24
provisions in it;" and in that case, as well as in the subsequent case of *Platt vs. Union Pacific R. R. Co.. 99 U. S., 48*, this Court recalls the history of the building of that great thoroughfare of commerce, and dwells upon the necessity the country was under to secure its completion, the inability of the Government, itself to undertake the work, and the inducements it was therefore necessitated to offer, to private capitalists, to enter on the enterprise, which inducements, the Court says, should not be overlooked, when years after, the road had become a success, and it was sought 25
to avoid them.

There is much in the language of the opinion of the Court as delivered by Mr. Justice Strong in the latter case, so appropriate to the circumstances of this trial, that we shall refer to it again and more fully later on.

First Discovery of River Phosphates.

Some time prior to the year 1870, it was discovered that the State of South Carolina was possessed of a large amount of phosphate rock and phosphatic deposits, which was then 26
supposed; as it has since proved to be, of great value on account of the bone phosphate of lime therein contained. This phosphate rock lay in the beds of the navigable streams of the State, at very considerable depths below the surface of the water, and also in certain of the marshes not theretofore granted by the State. The value, however, of this rock and deposit, was dependent upon its development; and to make it available it was necessary to mine, prepare and find a market for it. (Record, page 39.)

This was a matter of difficulty and novelty. The fact that 27
such deposits existed in the beds of the rivers and streams

had been ascertained, but no such deposits had ever before been mined or placed on the market, nor as far as is known had any mining operation of deposits similar in character and located in deep water, ever been carried on in the waters of South Carolina or elsewhere. Carolina phosphate had never been produced or sold, and was an unknown product in the markets of the world.

28 The development of this deposit required, therefore, not only the investment and outlay of very large amounts of capital and labor, but also the highest mechanical skill, in devising and operating methods for mining and preparing it for market, and in addition the best and most efficient commercial tact and experience, in order to handle the product, and force it upon the market in the face of other competing phosphatic deposits. *To do all this the State was wholly unable by any resources at her command.*

29 *The First Phosphate Grant in 1870, and Operations Thereunder.*

To induce other parties, therefore, to venture upon the development of these valuable deposits, and invest the necessary capital therein, the General Assembly of the State, by an Act passed 1st March, 1870, (14 Statutes S. C., 381,) granted to certain persons, to wit: George W. Williams and others, and such other persons as they might associate with them *the right to dig, mine and remove* for the full term of twenty-one years, from the beds of the navigable streams and
30 waters within the jurisdiction of the State, phosphate rock and phosphatic deposits, upon the condition that the grantees should pay to the State, the sum of one dollar per ton for every ton dug, mined or removed. (Record, page 40.)

Before commencing operations the grantees were required to give a bond in the penal sum of fifty thousand dollars, conditioned that they should make true and faithful returns to the Auditor of the State annually, on or before the first day of October, and oftener if required by the Auditor, of the number of tons "dug, mined and removed" by them from
31 the beds of the streams during the preceding year, and punctually pay on the first day of October, one dollar per ton

royalty, the bond to be renewed annually, and approved by the Attorney General.

The grant of the Act of 1870 was to George W. Williams and others named therein, and to "such other persons as they may associate with them." (*Statutes of So. Ca., Vol. XIV. p. 381.*)

Accordingly the grantees named in the Act on the 15th March, 1870, by a certain deed and article of agreement, made 32
known and declared, the names of certain of the persons who, were their associates as co-grantees in the Acts; and by this deed it was covenanted and agreed by and between the original grantees, and their associates so named, that one of them George S. Brown, the owner of a part of Chisolm's Island and a citizen of the State of Maryland, together with certain other associates therein named or to be named, should occupy the Coosaw River,—*the whole of it*,—for the purpose of mining under this grant, to the exclusion of the other grantees and associates, and that George S. Brown and his associates should 33
on the other hand, be excluded from mining elsewhere than in Coosaw River. (Record, p. 40 and 75)

George S. Brown and the associates with him, to whom the whole of the Coosaw River was thus set apart by this private agreement, uniting several other persons with them, soon after the execution of such articles of agreement, formed a joint stock company or mining partnership, for the purpose of exploring and mining the phosphate rocks and phosphatic deposits in the bed of the Coosaw River, which part- 34
nership has ever since been known as the Coosaw Mining Company, the appellants herein.

This Company, after much discouragement and failure, finally established themselves on Chisolm's Island, and occupied so much of the Coosaw River as lies opposite to and south of Chisolm's Island wheron their works were located. The part of the river thus occupied by them was about seven miles in length. They procured plant sufficient, as was supposed at the time, for the purpose of mining the 35
territory and commenced operations (Record, p. 41.)

By an agreement similar to that made with Geo. S. Brown and others, the grantees George W. Williams and others under the Act of 1870 declared that the South Carolina Phosphate Company (limited,) an English Corporation, was also one of their associates, and it allotted to them under similar conditions, the right to dig and mine in North and South Wimbee Creeks.

36 This Company was already the owner of the land adjacent to these creeks, and upon the execution of this agreement, it erected the necessary plant, and occupied and mined from such creeks. (Record, p. 82.)

George W Williams and the other grantees named in the Act, after making these two agreements, became incorporated under the name of the Marine Phosphate Mining and Manufacturing Company, of South Carolina. They invested capital and began operations generally in the beds of the navigable streams of the State, except in Coosaw River and North
37 and South Wimbee Creeks. (Record, p. 80.)

For the first two years the Coosaw Mining Company worked under the bond given by the original grantees of the State for the due return of royalty; but in 1872, the Company gave their own bond, which was accepted by the Comptroller General, and thereafter paid the royalty annually, directly to the State Treasurer as required by the terms of the act.

The royalty of the Company rose from $9,964 in 1873, to $23,310 in 1874 and to $25,751 in 1875. (See Record,
38 p. 90.)

Other Phosphate Grants and Proceedings thereunder.

Meantime other parties had also turned their attention to mining phosphates in the State's territory.

Two other Companies had been chartered by the Legislature of South Carolina under separate and distinct Acts of organization.

39 The South Carolina Phosphate and Phosphatic River Mining Company, was chartered March 9th, 1871, (14 Stat., p.

688,) with a right to dig and mine generally in the waters of the State, for the full term of thirty years. It was authorized to go into operation when $300,000 was subscribed. $200,000 was subscribed, but only a nominal amount of about $2,000 was actually paid in. Its operations were limited principally to granting permits to others to dig under its license and purchasing from them the products of their labor. (Record, p. 83.)

The Boatman's Company was incorporated Jan'y 29th, 1874, (15 Stat. p. 531) with the right to dig and mine for the full term of thirty years. Its capital was fixed at $30,000 and it was authorized to go into operation when $3,000 of the stock should be subscribed. It was required to pay a license fee of $100, and give bond in the sum of $5,000. This Company was given a general right to mine in all the waters of the State. (Record, p. 84.)

Condition of the business about 1876.

Up to 1876, however, the mining of the State's deposits had hardly passed its experimental stage. None of the Companies engaged in it had paid any dividends or returns to those who had invested their money, save only some small amounts paid by the appellants in the spring of 1876. It was a well known fact, that with the exception of the appellants and the South Carolina Phosphate Company, (limited) all the Companies, nominally engaged in such mining operations were financially weak, one of them, the Marine and River Phosphate and Manufacturing Company, being undoubtedly in an embarrassed condition, and in debt to the State.

As a matter of fact, with the exception of the appellant and the South Carolina Phosphate Company, (limited) all the other companies subsequently failed and are now out of business. (Record, p. 43.)

It therefore became a matter of consequence to the State, to protect and foster an industry containing possibilities so important to her finances, and to encourage those interested in mining in her territory to continue their efforts, and if possible to invest additional amounts in plant and machinery,

necessary to the further development and mining of her deposits.

There was also one other very important matter which forced itself upon the consideration of the State, and that was the method by which these phosphate deposits should be worked.

44 As we have seen there were five companies actually in operation, each of them under a grant from the State, giving them the right to mine for different terms, but to all generally, and without restriction anywhere, in the navigable streams and waters of the State that they pleased.

Two of these certainly, to wit, the Coosaw Mining Company and the South Carolina Phosphate Company (limited) possessed these rights under a contract with the State, which the State could not alter, for as these companies had no
45 charter which the State could repeal or alter, they were not in any way within its power.

The Coosaw Mining Company, being a co-partnership, and the South Carolina Phosphate Company, a foreign corporation, both of these concerns asserted under their agreement with George W. Williams and others, an exclusive right to mine in the territory in which they were located, claiming that, being rightly in occupation of this territory no one else could occupy it with them. They were limited to these localities *simply by said agreement among themselves and George W.*
46 *Williams and associates, with which the State had no connection, and to which it was not a party, and which was susceptible to change and modification at the will of the contracting parties.*

As between them and the State they had the right under the Act of 1870, to mine anywhere they chose in the navigable streams and waters of the State, and this right could not be curtailed or taken from them by any action of the State.

Whether the original grant to Geo. W. Williams and others,
47 had become subject to repeal, because of the fact that these parties had incorporated themselves as the Marine and River

Phosphate Company, or whether their right under the grant still inured in these individuals, independent of the corporation which they had chosen to create, presented a nice question, and one which would undoubtedly have resulted in serious litigation, had the State attempted to withdraw from them their rights under the Act of 1870.

The other companies mentioned also possessed the general right to mine in any of the State's territory. While it may be claimed that the State had the right to repeal these charters or modify them under the general power to that effect, reserved in the State, still the exercise of such a power would have had a disastrous effect on the growth of its industries, as making uncertain the value of rights granted by the State and accepted by individuals in good faith. 48

Meantime, however, it had become evident that it was advisable that the State should again regain control and possession of her phosphate territory, so as to grant it out among parties applying, in a number of restricted localities in which such parties might work. 49

Under the general right system, the miners, with the exception of the Coosaw Mining Company and the South Carolina Phosphate Company (Limited), had conducted their operations in a desultory way, wherever they could find a good supply of rock.

In this way they gleaned over the entire territory, going from spot to spot, whereever they found it most advantageous, and not properly exhausting any one deposit. The result was that the State's territory was being gleaned of the best of its deposits, and being thus left in a picked over condition, was being continually rendered much less valuable. 50

The difference between these operations, and those conducted by the Coosaw Mining Company and the South Carolina Phosphate Company (Limited), had become evident. These latter companies, confining themselves to one spot, were working with system and method, digging the rock as it came, and without hurrying to exhaust the good, and leave only the bad. (Record, p. 88–89.) 51

It may be mentioned that the deposit in the beds of these navigable streams of the State is by no means uniform, that rock to be a commercial delivery, must contain at least 55 per cent. phosphate of lime; that originally a large number of the deposits ran over this analysis, while others ran much lower; and that it had been found that where companies were confined to a particular locality, and given
52 there exclusive rights, by a system of mixing lower and higher grade rocks, they were obtaining a product fit for commercial delivery, and in this way large amounts of lower grade rock were annually sold to the advantage of the State. (Record, p. 891.)

It therefore became evident that the true interests of the State were, that all the mining in her territory should be conducted according to this method. But in order that this plan should be successfully conducted, it was necessary to
53 recall the general rights which had been already issued, substituting such terms and such arrangements, as would be satisfactory to the parties holding them.

It was therefore *desirable* that in some way or other, these companies should be induced to accept other terms than those which they had enjoyed, and to leave the State free to utilize its phosphate territory under the exclusive system above described.

About this time also the Government of the State became
54 impressed with the importance of collecting the royalty oftener than annually, the necessities of the State requiring that this money should come in more frequently, and an effort was made by the Comptroller General to bring about such a result under the then existing Acts.

To carry out this purpose he addressed communications to the Coosaw Mining Company and others, stating the necessity of the payment of royalty on every ton as it had been dug, mined and removed, and not upon every ton only as exported from the State, as the Companies were
55 then doing. Record, page 41.

This demand on the part of the Comptroller General was

resisted by the State's phosphate companies, they taking the ground that under the Act of 1870, and the other later Acts, the royalty was not to be paid until the rock was mined and *removed* to market.

An elaborate opinion was given upon this question by Mr. Edward McCrady, Sr., the Solicitor of the Coosaw Mining Company, who had been consulted on the question.

In consequence of this refusal, the Comptroller General 56
applied to the General Assembly for legislation on the subject, and a concurrent resolution was adopted 10th February, 1876, directing him to commence legal proceedings on the bond of the Coosaw Company and to contest the question. (Reports and Resolutions of the General Assembly of the State of South Carolina at the regular session 1875–76, page 1364).

Passage of the Act of 1876.

Some days after the passage of this concurrent resolution, 57
to wit: 29th Feb., 1876, a bill was introduced into the Senate, entitled:

"A bill to settle definitely the periods at which returns shall be made of phosphate rocks and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina, and the royalty shall be paid thereon; and also to fix the terms on which this Act may be accepted by the parties named therein."

Journal of the Senate 1875-76, pages 503–4.

58

In the case of Morton, Bliss & Co., vs. Comptroller General, IV. So. Ca.; 448-449, it was said that when a sovereign State enters into a contract with an individual it assumes to be bound in all particulars as an individual under like circumstances would be bound, and that when the authority under which a contract is made, proceeds wholly from the Legislature, the Act and proceedings of that body in reference to it, enter into and become a part of such contract.

And this Court in Blake vs. National Banks, 23 Wall, 807, 59
referred to the Globe Congressional Journal of the 41st

Congress and the original Journal of the House of Representatives to aid it in construing the peculiar phraseology of the Act the Court was considering.

And see American Net Co. vs. Worthington, 141, U. S., 473-4.

We are at liberty therefore to refer to the Journals, &c., of the General Assembly of the State, upon its pas-
60 sage, to aid us in considering the questions which arise under this bill which was enacted into a statute.

From these Journals it appears that this bill was most carefully considered.

It was introduced in the Senate on the 29th February 1876. (Senate Journal 1876, p. 503-4.) The next day, 1st March, it was referred to the committee on mines and mining (*Ibid 519.*) A week after, March 8, it was favorably reported upon (*Ibid, 541*) and on the 9th March
61 the further consideration of the report and bill was postponed and made the special order for Saturday, March 11, 1876, at 11.30 A. M. (*Ibid, p. 557-8.*)

It was discussed for days, and every effort to defeat it failed, and it finally passed the Senate on the 16th March, and was sent to the House of Representatives. There it received the same careful consideration, the yeas and nays having been called again and again upon its passage. (*House Journal, pp. 611, 612.*)

62 The Act thus passed is divided into two parts or branches of the subject matter, to each of which there is a recital.

The *first* recites that differences had arisen between the Coosaw Mining Company and the Comptroller General, as to the time and manner in which the Company should make its returns, and prescribes how the returns should in future be made.

The *second* recites that it was *desirable* that the Coosaw Com-
63 pany and all others engaged in mining phosphates, should accept the terms of the Act in order to make it binding on them,

and prescribes the terms upon which it may be accepted by them, which terms it requires shall be accepted by the Coosaw Company, and all other companies, within ten days from its passage. These terms the Coosaw Company and all other companies accepted within the time limited.

Here, then, was a contract—a proposition made by the State to the companies mining in her territory, which the companies were free to accept or refuse, and which the companies did accept and comply with. 64

Let us examine its terms. The Act commences with this recital :

"Whereas, differences have arisen between the Coosaw Mining Company and the Comptroller General as to the times and manner in which the said Company shall make their returns, and of the number of tons of phosphate rocks and phosphatic deposits dug, mined and removed by them from the beds of the navigable streams and waters of the State, and also as to the times when the royalty thereon shall be paid ; therefore, for remedy thereof." (Record, p. 11.) 65

And it then proceeds to enact :

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said Coosaw Mining Company *and other companies* engaged in digging, mining and removing phosphate rocks and phosphatic deposits from the beds of the navigable streams and waters of the State, shall be, and they are hereby required, from and after the passage of this Act, to make to the Comptroller General true and faithful returns of the number of tons of phosphate rocks and phosphatic deposits they have so dug, mined *and removed*, or otherwise shipped to market at the end of every month, and shall punctually pay to the State Treasurer the royalty *already provided by law* to be paid thereon, *at the end of every quarter or three months* the first quarter to commence to run on the first day of March in the present year. 66

Sec. 2. That the said Coosaw Mining Company, *and all other companies and persons* mentioned in the preceding section, shall, *within ten days from the passage of this Act, enter into new bonds* in the penal sums, and in the manner and form already provided by law, but conforming in their conditions to the terms set forth in the said preceding section, *and also pay to the State Treasurer the royalty accrued up to the said first day of March of the present year.* 67

This Act thus made several changes in the provisions of that of 1870, and the other Acts authorizing mining in the State's territory. The Act of 1870, and other subsequent Acts, required returns to be made to the Auditor annually, *or oftener* if required, but required royalty to be paid only annually. The State had reserved the right to require returns to be made as often as she chose. She had stipulated
68 *as to what* the returns should be on, an *as to the time when* royalty should be paid.

The phosphate companies admitted the right of the State to alter the *times* of the returns; but denied the right to alter the manner or *substance* of the returns or *times of payment of royalty.*

This proposed legislation at once, therefore, brought to public attention, not only the special matter involved in the demand made by the Comptroller General upon the
69 phosphate companies, but also what right, if any, the State had to alter the existing contracts made between herself and the phosphate companies, and what rights the companies possessed under the several Acts which had been passed prior to that time, creating such contracts.

The Coosaw Company and the South Carolina Phosphate Company limited, claimed that they had a distinct, irrevocable grant to the exclusive possession of the territory which they were then occupying, without provision of for-
70 feiture, for the term of 21 years, and that the State could not make any change in the substance of the returns or the time of the payment of royalty.

The other companies claimed the general right to mine in all the waters of the State.

The character of the tenure of the grant thus became involved in any settlement of the differences between the State and the phosphate companies.

The State could not alter the terms or time of the pay-
71 ment of royalty without the consent of the phosphate companies as above stated.

There was another point also to be settled. The Coosaw Mining Company had, as we have seen, by the terms of the agreement between the original grantees under the Act of 1870, and those who composed the Coosaw Company a right to occupy and mine exclusively *the whole* of the Coosaw River.

The South Carolina Phosphate Company (Limited) claimed, under a similar agreement, the exclusive right to 72
occupy and mine in North and South Wimbee Creeks.

The South Carolina Phosphate and Phosphate Mining Company claimed a general right to mine in all the rivers of the State, which was resisted on behalf of the Marine River Mining Company, the latter claiming the Act of 1870 to confer an exclusive right.

The matter had been argued in the United States Circuit Court and the decision of the Circuit Judge was against the claim of the Marine Company, but in this case the Marine Company did not set up, as a basis of its claim, that it was 73
in actual occupation of the territory involved. And while the decision had been rendered, the time for appeal had not expired, and the matter was still pending. Moreover, this decision could bind only the two parties to the cause.

To meet these difficulties and questions the Act proceeds to offer terms to the companies to accept it. It recites and enacts as follows:

"And whereas *it is desirable* that the Coosaw Mining Company and all other companies and persons engaged in digging, mining 74
and removing phosphate rock and phosphatic deposits as aforesaid *shall accept* the terms of this Act, *in order to make it binding on them respectively.*

And whereas the said Coosaw Mining Company have already occupied so much of the Coosaw River as lies opposite to and south of Chisolm's Island, whereon their works are located, and to the marshes thereof, and have expended large sums of money in establishing themselves thereon with sufficient mining plant for mining and preparing for market the phosphate rocks and phosphatic deposits of that part of the said Coosaw River, *therefore in consideration thereof.*

SEC. 3. That the said Coosaw Mining Company on accepting the terms of this Act within ten days shall thenceforth have the exclu- 75
sive right to OCCUPY, and dig, mine and remove phosphate rock and

phosphatic deposits from ALL THAT PART of the Coosaw River above mentioned SO LONG AND NO LONGER THAN, "they shall so dig, mine *and* remove and otherwise send to market and punctually pay the royalty thereon as provided in the first section of this Act."

The fourth section of this Act provided that all other companies and persons engaged in phosphate mining under the authority of the State who should accept the terms of
76 the Act within ten days should have the same exclusive right where they had respectively occupied and established themselves for mining purposes and on the same limitations as are prescribed in the preceding section of the Act.

The fifth section for the purposes of the Act repealed all Acts and parts of Acts inconsistent with this Act.

In analyzing the recital and provisions of the second part of the Act it will be observed that,

77 1. The State deemed it *desirable* that the Coosaw Company and the other companies mining in the territory should accept the terms of the preceding part of the Act, *in order to make it binding on them.* Their acceptance therefore was a matter of interest to the State, and a voluntary contractual act on the part of the companies.

2. That the State recognized, that the fact that the Coosaw Company had occupied a part of Coosaw River, and established themselves there with sufficient mining plant, was a matter entitling the Company to special consideration, whether
78 it gave the Company a legal right to exclusive occupation or not. And that similar occupation by other Companies was entitled to equal consideration.

That the State therefore offered to all the Companies certain terms to induce them to accept the Act which was in the interest of the State. These were :—

3. That on accepting the terms of the Act *within ten days* the Coosaw Co., should have the *exclusive right to occupy* and
79 mine phosphates, not from the whole of Coosaw River as it had stipulated, and claimed under the agreement with the

original grantees of the Act of 1870—but to *that part* of the River only *which they had occupied* and which was opposite to their works.

4. That this right should be limited however to only "*so long as and no longer than*" they should make true and faithful returns of the rock mined and punctually pay the royalty thereon, as provided by the Act, whether more or less than 21 years. 80

5. That all the other Companies mining in the State's territory, who should in the same period, accept the terms of the Act, should have exclusive right to occupy the localities wherein they were separately established "*so long as and no longer than*" they continued to make proper returns and pay the royalty provided, whether more or less than their several different terms.

81

Legislative Proceedings Attending Passage of Act.

As already stated the Journals of the General Assembly show that the terms of this Act were carefully considered and approved.

It was first moved in the Senate to strike out the enacting clause of Bill which was withdrawn. (Sen. Jour. p. 583.) Then it was moved to re-commit the Bill to the committee on mines and mining—this the Senate refused to do. (Ib. p. 584.) Then it was moved to amend the Bill by striking out of the 82 first section the words "*the said Coosaw Mining Company and.*" This was decided in the negative. (Ib. p. 584.)

Then it was moved by one of the best and ablest citizens of the State—afterwards Governor,—to amend Sec. 3 by striking out before the word "days" the word "ten" and inserting in lieu thereof the word "thirty," thus to give the Company thirty days within which to accept. This was negatived. (Ib. p. 584.)

Then it was moved to strike out of the preamble to Sec. 3 the words "*therefore in consideration thereof.*" The Senate re- 83 fused to do so. (Ib. p. 584.)

Then it was moved to strike out of Sec. 3 the word "*exclusive.*" This was also refused. (Ib. p. 584.)

The Bill was then passed to a third reading with notice of amendments. (Ib. p. 584.)

On the third reading an amendment striking out the repealing clause was rejected. Sec. 5. (Ib. p. 590.)

84 Also a motion to kill and one to re-commit. (Ib. p. 607.)

Also a motion to strike out Section 3. (Ib. p. 607, 8.)

Also an amendment to add to Sec. 3 the following proviso:—"*Provided*, that the said Company shall not dig, mine and remove less than forty thousand tons per annum." (Ib. p 608.)

In the House the bill was dicussed from 16th to 21st March, and various amendments and propositions to indefinitely postpone &c., voted down. (House Jour. p. 594, 599, 610, 611, 612, 623, 624, 625.)

85 On page 625 we find the following:

"The following paper was presented to be entered on the Journal:

We vote "aye" on the passage of this Bill, because we are informed by the Comptroller General, Hon T. C. Dunn that it is *to the interest of the State* to pass this measure in order to more fully protect *the State* in the revenue derived from Phosphate Companies. As we have all confidence in the word of that officer, he never having deceived us, *ergo* we vote for South Carolina and her interests.

(signed) W. A. HAYNE,
J. W. WESBERRY.

86 On 23rd March 1876, it was ratified (Sen. Journal p. 694), and received the approval of Governor Chamberlain on the 28th March 1876.

It is true that the original difference between the State and the Phosphate Companies arose upon a demand by the Comptroller General for an advance payment of Royalty, and involved only the matter of Returns. But this at once drew into question the terms of the tenure of all the Compa-

87 nies.

The matter of Returns and time of payment was the

occasion of the act. The State took the opportunity of settling both questions, and of introducing the policy of exclusive grants to those who would settle themselves in one place with sufficient plant. The mere question of the construction of the Act of 1870, as to the time of paying royalty, could have been settled by the Courts if that was all that was involved, but it was carried into the Legislature because other matters were involved. 88

Analysis of the Act of 1876.

Upon the acceptance of the Act, the State got in the trade from the Coosaw Company.

1. $13,991.25 money down *in advance* of Royalty.
2. Quarterly payments instead of annual.
3. New bonds to correspond.
4. The surrender of the claim of the company to an irrevocable tenure for a definite term under the provisions of the Act of 1870. 89
5. The surrender of the claim of the Company to the whole of Coosaw River, and of its right to mine generally in all the other waters of the State, and a restriction to the Company to only that part of Coosaw River opposite their works.

The Company got in the trade.

1. The recognition of what she claimed as of right: that royalty was to be paid only on rock *shipped*. 90
2. The recognition of the exclusive right she claimed, but to a restricted territory.
3. The *conditional* and *uncertain* extension of their grant; she gave up the definite, irrevocable tenure of 21 years she claimed, for an indefinite tenure depending upon the prompt making of returns and payment of royalty when due.

The State got in the trade from the other companies, the same concessions as she obtained from the Coosaw Mining Company above indicated, and she also got what was of 91
exceeding value to the State, *the surrender by these companies*

of all their existing rights to mine in all the navigable streams and waters of the State, and their restriction to certain defined localities, where they were to mine *only so long as, and no longer than* they fulfilled the terms of the Act.

That the term "*so long as, and no longer than*" had changed the tenure of the right to mine to an indefinite period depen-
92 dant upon the compliance with the terms of the Act, is no extravagant claim on the part of the Coosaw Mining Company, appears from the report of the Attorney General of the State a year after the passage of the Act. A resolution of the General Assembly of the State, had instructed him "to inquire into the nature of the several charters of the Phosphate Mining Companies with a view to define and protect the rights and interests of the State therein."

Under this resolution he reports, referring to the Act of 1876; (Record, p. 87.)

93

"Whether any or all of the companies claim such perpetual license I am not advised, nor have I felt myself authorized to inquire as the Legislature alone is competent to deal with the subject. My duty is performed in calling attention to the terms of the Act and the questions which may arise under it. There is enough in the very skillful wording of the Act to raise the doubt, and indicate the probability, if not certainty, of such a claim being made hereafter when the terms for which the licenses were granted, shall have expired.

It is scarcely prudent to leave the question an open one until then and unless the State acquiesces in the doctrine that a perpetual license is granted to all companies which comply with the Act of 1876, it will
94 be for the Legislature to adopt such measures as in its judgment may be necessary for the protection of the rights and interests of the State.

Thus the State obtained from the Phosphate Companies, a surrender of their general right to mine at will, and anywhere they pleased in the phosphate territory of the State, in consideration of enlarged privileges and rights in restricted localities.

The territories so surrendered were thus left free to, the State to be utilized by the State in such a way as she might
95 deem advisable.

These companies got from the State the same benefits

above enumerated for the Coosaw Company, including the recognized exclusive right to be protected in their mining operations in certain defined territory, and a conditional enlargment of the duration of its right to a continuous tenure to mine *i. e.* "so long as and no longer than" they should make returns and pay the royalty as provided in the Act.

The State accepted the consideration, and availed herself of it to the full extent two years later, when by the Act of March 1878 she parcelled out among a number of companies then created, the territories so surrendered under the Act of 1876, giving exclusive rights to the Companies thereby created to mine in designated portions of such territories. 96

We shall find occasion to call the attention of the Court more particularly hereafter to this Act of 1878.

The Companies continued to mine under the provisions of the Act of 1876, claiming, as was well known, that the right thereby conferred, was to continue indefinitely until the exhaustion of the phosphate deposits contained in the territory indicated, unless forfeited by the failure to comply with its conditions. 97

Action of Coosaw Company under Act of 1876.

That the contract was so accepted by the Coosaw Company, was well known to the State and to the Public generally.

Soon after the passage of the Act of 1876, and because the right thereby conferred upon the Coosaw Company was to continue indefinitely upon the conditions mentioned, that Company invested and expended a very large sum of money, in addition to that already invested or expended by them. in the procurement of additional dredges, wash-boats, and tugs, and the erection of additional drying sheds, wharves, and other plant on shore, for the purpose of extending their operations and engageing more largely in the business of mining such deposits and preparing them for market. 98

This additional amount so invested and expended was nearly two hundred and fifty thousand dollars. 99

Record page 45.

The Coosaw Mining Company have, from that time to the commencement of this proceeding, exclusively occupied and dug, mined and removed phosphate rock from the said territory, aud have punctually paid the royalty as required by the said Act of 1876, and fully complied with every condition and requirement of the said Act and of the contract thereof. And no complaint has, from that time to the com-
100 mencement of this proceeding, ever been made by the State of South Carolina, or any officer or agent of the said State, of any failure or default on the part of these defendants to fully and faithfully comply, with all of the said conditions and requirements in every particular.

From the passage of the Act of 1876 up to the time of this action, the Coosaw Company have paid into the treasury of the State, in cash quarterly payments, the sum of one million two hundred and twenty-three thousand seven
101 hundred and twenty-six 94–100 dollars, ($1,223,726.94), making, with the amounts previously paid by them to the State, a total payment of one million two hundred and ninety-seven thousand seven hundred and eighty-nine 94–100 dollars, ($1,297,789.94). This amount has been paid to and received by the said State in cash, without the investment on the part of the State of one dollar and without any risk or expense on its part whatsoever. The amount so paid by these defendants is greater than the aggregate amount received by the State from all other persons or companies
102 mining phosphate rock in her territory.

(Record page 46.)

The Act of 1890.

No action was ever taken by the State indicating any different construction as placed by her on the Act of 1876, until the Legislature met in December 1890, when they passed the Act which is set out in full at page 13 of the Record.

By this Act they created a Board of phosphate commis-
103 sioners, directed them to take possession of the Coosaw River on and after the first of March, 1891, and license and

permit other persons to mine therein, providing that if any person attempted to hinder or impede them in so doing, or should continue to mine in that territory without a license obtained from the Board, that the Board should not only have the right to institute any legal proceedings necessary in the name of the State, but that the parties so acting should be subject to fine and imprisonment, and their machines and entire plant used in such operations, should be confiscated to the State. 104

After the Act of 1890, so harsh in its terms, the Board of phosphate commissioners, the Relators in this suit, entered upon the Coosaw territory, licensed other parties to mine therein and put them in possession, threatening to imprison the employees and confiscate the plant of the Coosaw Mining Company if they continued their mining operations.

In view of these provisions of the Act of 1890, the Coosaw Mining Company was compelled to suspend operations and seek relief in the Courts. 105

POINTS OF LAW

I. GENERAL RULES FOR CONSTRUING STATUTES.

We submit that the general rule for construing Statutes is, that where the meaning of the Statute is plain, it is the duty of Courts to construe it according to its obvious terms. In such a case there is no necessity for construction. 106

The rule is, perhaps most clearly expressed by Mr. Endlich in his recent treatise on the Interpretation of Statutes, Sec. 2, page 4, as follows:

"The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be con- 107

strued according to the rules of grammar; and from this presumption it is not allowable to depart, unless adequate grounds are found, either in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the legislature."

In United States vs. Wiltberger, 5th Cranch, 96, Chief Justice Marshall, in pronouncing the decision of the Court says:

108

"The case must be a strong one indeed which would justify a Court *in departing from the plain meaning of the words*, especially in a penal Act in search of an intent which the words themselves did not suggest."

In U. S. vs. Reese, 92d U. S., page 244, the Court says:

"In United States vs. Hartwell, 6 Wall., 385, the object in construing penal, as well as other Statutes, is to ascertain the legislative intent. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intent must be gathered
109 from the words. When the words are general, and embrace various classes of persons, *there is no authority in the Court to restrict them to one class when the purpose is alike applicable to all.*"

In Ruggles vs. Illinois, 108th U. S., page 534, Chief Justice Waite, in delivering the opinion of the Court, says.

"It is argued, however, that this cannot be the meaning of the amending Act, because if the company had, under its old charter, the absolute right of fixing rates, subject only to a limit of three cents a mile on passengers, and the State had no power to interfere, except to keep the annual profits down to fifteen per cent. per annum on
110 the paid up capital, *no one can believe it would have surrendered such a privilege and taken in lieu another so unfavorable as this.*

'It is undoubtedly true, as was claimed in argument, and has been often said from the Bench, that amendments to the charters of corporations, are usually made at the solicitation of the corporation themselves, who cause the bills to be prepared and submitted to the legislatures for enactment, and that, if there is doubt as to the construction of what is enacted, this fact may be resorted to in aid of interpretation.

"But Vattel's first general maxim of interpretation is that *it is not allowable to interpret what has no need of interpretation*, and he continues: When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no
111 reason for refusing to admit the meaning which such deed naturally presents.'

"To go elsewhere in the search of conjectures, in order to restrict or extend it, is but to elude it. Vattel's Law of Nations, 244. Here the words are plain and interpret themselves."

In Thornley vs. The United States, 113th U. S., page 313 the question arose as to the construction of an Act of the United States allowing pay to certain officers of the navy, in which the officers contended for one construction of the Act, while the United States opposed such construction. The 112
Court, in considering the question, says:

"Where the meaning of *a Statute is plain it is the duty of the Courts to enforce it according to its obvious terms. In such a case there is no necessity for construction.*"

After considering the construction claimed, the Court says:

"To give the statute this meaning would be legislation and not interpretation."

In United States vs. The Central Pacific R. R. Co., 118 113
U. S., 240, on appeal to the Court by the U. S., the Court says:

"There is another view of the controversy which seems to us conclusive. As the contract between the United States and the railroad company contained in the Acts of July 1, 1862, and of July 2, 1864, has been interpreted by this Court to authorize the retention by the Government of compensation for services, only in those roads which the United States aided in building, the construction which the appellants seek to put on the second section of the Act of May 8, 1878, would not only render that section a breach of faith on the part of the United States, but an invasion of the constitutional rights of 114
the appellee. We are bound, if possible, so to construe the law as to lay it open to neither of these objections. Broughton vs. Pensacola, 93 U. S., 266; Red Rock vs. Henry, 106 U. S., 596; Hobbs vs. McLean, 117 U. S., 567; decided at the present term, and cases there cited; United States vs. Coombs, 12 Pet., 72.

The construction contended for by the appellee preserves the good faith of the government, and frees the Act from the imputation of impairing rights secured by the Constitution of the United States."

In Louisville Gas Co. vs. Citizens' Gas Co., 115 U. S., 697, the Court was called on to construe a statute which was claimed, (as is the claim here), to constitute a contract. 115
And the Court says:

"In ascertaining the Legislative intent, we attach no consequence to the negotiations between the Louisville Gas Company and the City Council of Louisville, as to the provisions to be embodied in an amended charter giving the Company exclusive privileges after January 1, 1869; *for the words of the Act of 1869 being, in our opinion, clear and unambiguous, effect must be given to them according to their ordinary signification.*"

In Holbrook vs. Holbrook, 1 Pick. 250, Justice Wilde, de-
116 livering the opinion of the Court, says:

Where *the words of a statute are clear and unequivocal, the rules of construction established for doubtful cases are not applicable,* and it appears to me that the words of this section of the statute are so explicit as to leave no room for construction."

And see Whitney vs. Whitney, 14 Mass., 93, and the full notes by Mr. Rand added thereto.

Let us look again at the Act of 1876 in the light of these principles set down.

117 We must remember that we are not to depart from the ordinary meaning of the words, and, where the meaning of the statute is plain, it is the duty of the Court to enforce it according to its obvious terms, and in such case there is no necessity for construction.

The Act, after stating what differences had existed between the Coosaw Mining Company and the State, and having provided for such changes as the State desired in the existing contract, and having further stated that it was desi-
118 rable that the Coosaw Mining Company should accept the terms of this Act in order to make it binding on them, and that they have already spent large sums of money in the purchase of plant necessary to carry out the purpose contemplated by the Act. Therefore, in consideration of such investment and of the acceptance by the Company of the terms of the Act, it provided:

"Section 3. That the said Coosaw Mining Company, on accepting the terms of this Act within ten days from the passage thereof, *shall thenceforth have the exclusive right to* OCCUPY, *dig, mine and remove* phosphate rock and phosphatic deposits in *that part of Coosaw River*
119 above mentioned, SO LONG AS AND NO LONGER THAN they shall make true and faithful returns of the number of tons thereof, they

shall so dig, remove and ship, or otherwise send to market, and punctually pay the royalty thereon, provided in the first section of this Act."

Is it possible to suggest words which would make clearer or more plain the position, that this Act sustains the claim of the appellants, to a continuous right to mine in the said river, than those contained in the Act itself?

Is it possible to conceive of stronger words to express 120
plainly, clearly and beyond all doubt, that the appellants shall have a continuous right so to mine, than the words, that "upon accepting the terms of the Act, they should have an exclusive right to mine, SO LONG AS AND NO LONGER THAN *they shall make true and faithful returns of the number of tons mined, and pay the royalty thereon.*"

Upon this the appellants stand. They have faithfully fulfilled the conditions of the Act, and, having done so, they claim the right given in the said Act, to mine in the said
territory *so long as and no longer than* they continue to ful- 121
fill said conditions.

Is there anything here which, in the language of Chief Justice Marshall, above quoted, would justify the Court in departing from the plain meaning of these words?

Are not the words of this Act so clear that effect must be given to them according to their ordinary signification?

Is not the meaning of the statute so plain that there is no necessity for construction?

122

It seems to us that further argument would be a mere repetition of the words of the Act.

The appellants ask only the application of these principles to the present case. They submit confidently that the words of the Act of 1876 are clear and unambiguous, conferring a continuing right to occupy and mine, "*so long as and no longer than*" they fulfill the conditions of the Act,—and, this being so, no other construction can be placed on them.

123

2. CONTRACTS OF A STATE ARE CONSTRUED AS CONTRACTS BETWEEN INDIVIDUALS.

We submit, that statutes, which are binding on States as contracts, are to be construed as contracts between natural persons, and that no advantage is to be given to the State in such
124 *construction.*

It is well settled, in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor.

But an opposite rule is claimed as proper in cases of grants by the King or by the State, where in cases of doubt the construction is more favorable to the King or State and against the grantee. And the decision of the Circuit Court in this case rests entirely upon the application of this principle. As-
125 suming a doubt, and that this doubt must be resolved in favor of the State, the decision was adverse to the appellants.

We submit that like most other rules this is also limited in its application, and that there are to it many exceptions and qualifications.

And first it is to be called into requisition, if at all, only after all other rules of construction fail.

126

This principle is distinctly stated by Blackstone, in stating the converse rule, that private grants are to be construed most strictly against the grantor. He says:

"And in general, this rule, being a rule of some strictness and rigor, *is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail.*"

Next we submit that where the grant is made for *a valuable*
127 *consideration*, where it assumes the form of a contract between the King or State and the subject, there the rule does not

apply, but in such cases the same rule of construction applies, as in cases between individuals.

Chitty in his work on Prerogative, Chap. 16, Sec. 5, thus states the rule:

"If the construction were doubtful the grantee would be entitled to the benefit of the doubt. The rule is not so in the interpretation of the King's naked grants from pure favor; *yet where a consideration* 128
is received, the rule prevails that a public grant must be construed most favorably to the grantee."

There can be no doubt in this case that a consideration was received, for the Act expressly so declares.

So in Bacon's Abridgment Title Prerogative, Vol. 8, p. 152, these words of Lord Raymond, affirming the rule are quoted:

"Where the King's grants are upon a valuable consideration, *they* 129
shall be construed favorably for the grantee, for the honor of the King," citing Sir John Moulin's case, 6 Coke, p. 5; Whistler's case, 10 Coke, p. 65.

See also Bacon's Ab. T. 2, p. 602 to 604; Comyn's Digest, Grant G., 12, in which latter authority the same rule is laid down that

"Royal grants, for valuable consideration, *are liberally construed in favor of the grantee.*"

And Lord Coke, after stating the decision of Sir John 130
Moulin's case, 6 Coke, 6 (supra) adds these words:

"Note the gravity of the ancient sages of the law, to construe the King's grants beneficially for his honor, *and not to make any strict or literal construction in subversion of such grants.*"

The rule so laid down in Bacon's Abd., above quoted is fully recognized in this country. In the case of the Charles River Bridge vs. Warren Bridge, 7 Pick, 469, the Court says:

"There are some legislative grants no doubt, that may admit a dif- 131
ferent rule of construction, such as grants of lands on valuable consideration and the like. It is said that *when the King's grants are upon*

valuable consideration, they shall be construed favorably for the patentees for the honor of the King." Bac. Prerog., F. 2.

And in the case of Richards vs. Daggett, 4 Mass., 534, 537, Chief Justice Parsons says in delivering the opinion of the Court:

"It is always to be presumed, that the legislature intended the
132 most beneficial construction of their acts, when the design of them is not apparent."

Why was this rule adopted, that where the act partakes of the nature of a contract, or is based on valuable consideration, it is construed exactly as it would be in the case of a private grant, favorably to the grantee? Plainly because the act is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government, that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its
133 own contract.

This rule has been frequently recognized by the Supreme Court of South Carolina.

In McMullen vs. McCulloch, 2 Bailey, 346, the exact question did not arise. But in an issue between two grants from the State, it was claimed that the elder should be strictly construed against the grantee, the effect of which would have been to exclude the territory in dispute. But the Court refused this request, and on the contrary con-
134 strued the grant liberally, embracing the property in question.

In State vs. Bank of the State, 1 S. C., p. 76, the Supreme Court, in considering how far the idea of State sovereignty, is applicable to all acts of a State, says:

"It does not at all change the nature of the relation of the bank to its creditors, that the State was the sole owner of the capital. The State in its sovereign capacity is distinct and separate from the bank. When it established a trading corporation *did it invest it with any of its*
135 *sovereign power?* or, because the State was the sole stockholder, did the charter which it conferred acquire any higher power by reason of the

status of the stockholder, or were the judicial tribunals of the State *to construe it by any other rule than that by which they would be guided if the corporation consisted alone of private persons?*

"On the contrary when the State invests its funds either alone or with others in a banking or other company, it does not carry into it any of the elements of its sovereign power: *but occupies the same position of any other stockholder.* The Bank of the United States vs. The Planters Bank of Georgia, 9 Wheat., 907; Bank of Commonwealth of Kentucky vs. Wister, 2 Pet., 318."

136

In Morton, Bliss & Co. vs. Comptroller General S. C. 4, S. C., p. 448. The Supreme Court, in considering the proper construction of legislative contracts of a State, says:

"When a sovereign State enters into a contract of borrowing with an individual, it assumes to be bound, in all particulars, *as an individual under like circumstances would be bound*, by what is expressed or properly implied by the terms of such contract. The measure of its obligation is that implied to individuals. It is only in the consequences that flow from a breach of the contract that there is a difference between a State and an individual. The individual can 137
be sued, the State cannot. The reason of the difference is that a suit presupposes the submission of a controversy between two or more, to a third party independent of both, and therefore capable of dealing with the question in a judicial spirit and judicial authority."

In State ex. rel. McKinley vs. State Treasurer 8 S. C., p. 79, the decision in Morton, Bliss & Co, vs. Comp. Gen. supra is quoted and approved.

This rule has also been repeatedly recognized and enforced in this Court, from the earliest times down to the 138
present day.

Huidekoopers Lessees vs. Douglass, 3 Cr. 63, decided in 1805, involved the construction of an Act of the Legislature of Pennsylvania, entitled an "Act for the sale of the vacant lands within the Commonwealth." By it the public domain was given or sold to settlers or purchasers on certain conditions named in the Act. It was sought to give the Act a strict construction operating against the rights as claimed by purchasers and settlers under its terms.

But the Court, Chief-Justice Marshall, pronouncing the 139
opinion, says:

"This is a contract; *and although a State is a party, it ought to be construed according to those well established principles which regulate contracts generally.*

"The State is in the situation of a person who holds forth to the world the conditions on which he is willing to sell the property.

"If he should couch his propositions in such ambiguous terms, that they might be understood differently, in consequence of which, sales were to be made, and the purchase money paid, he would come with an ill grace into Court to insist on a latent and obscure meaning, which
140 should give him back his property, and permit him to retain the purchase money. All those principles of equity, and of fair dealing which constitute the basis of judicial proceedings, require that Courts should lean against such a construction.

Curran vs. State of Arkansas, 15 How., 308, was a case where the State had become a stockholder in a bank and a question arose how far by entering into this contract, its sovereignty had been waived. The Court says:

"And first as to the character of the parties. By the charter of this bank the State of Arkansas became its sole stockholder. But the bank
141 was a distinct trading corporation, having a complete separate existence, enabled to enter into valid contracts, binding itself alone, and having a specific capital stock, provided and held out by the public as the means of paying its debts.

"The obligations of its contracts, the funds provided for their performance, and the equitable rights of its creditors *were in no way effected by the fact that a sovereign State paid in its capital*, and consequently became entitled to its profits. When paid in, and vested in the corporation, the capital stock became chargeable at once with the trusts and subject to the uses declared and fixed by the charter, *to the same extent and for the same reasons as it would have been if contributed by private persons.*

142 "That a State by becoming interested with others in a banking corporation, or owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, *that it lays down its sovereignty*, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to these transactions not derived from the charter, has been repeatedly affirmed by this Court, in the Bank of the United States vs. The Planters Bank, 9 Wheat., 904; Bank of Kentucky vs. Wistar et al., 3 Pet., 431, Briscoe vs. The Bank of Kentucky, 11 Ind., 324."

In Smoot's case, 15th Wall, page 45, the Court in considering an appeal from the Court of Claims in which coun-
143 sel were urging that a different construction should be placed on the contract, in consequence of the government

See Garrison vs. U. S. 7 Wall. 690 where a doubtful contract was construed against the government.

being a party to it, than would be allowed if it was between individuals, the Court says:

"These are addressed in vain to this Court. Their proper theatre is the halls of Congress, for that branch of the Government has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts in which the United States is a party in the same sense in which an individual might be, *and to which the ordinary principles of contracts must and should apply.*

"It would be very dangerous indeed, to the best interests of the 144
Government—it would probably lead to the speedy abolition of the Court of Claims itself—if, adopting the views so eloquently urged by counsel, that Court, or this, should depart from the plain rule laid down above, and render decrees on the crude notions of the judges of what is or would be morally right between the Government and the individual."

Davis vs. Gray, 16 Wall, p. 232, was almost exactly similar on the point now under discussion to the case before the Court. In that case the State of Texas had by sundry acts of her Legislature granted to certain railroads large 145
bodies of the public lands of the State, on condition of the building of such railroads and on other conditions named in the Acts.

It was contended that the Acts should receive such a construction as would terminate the grants and enure to the benefit of the State, and her subsequent grantees.

But the Court says;

"That the Act of incorporation and the land grant here in question, were contracts, is too well settled in this Court to require discussion.
"When a State becomes a party to a contract, as in the case before 146
us, the same rules of law are applied to her as to private parties under like circumstances. When she or her representatives are properly brought into a forum for litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

In Murray vs. Charleston, 96th U. S., 445, the Court says:

"The truth is, States and cities, when they borrow money and contract to pay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private 147
persons.

In Hall vs. Wisconsin, 103d U. S., page 10, the Court says:

"But when the Legislature makes a contract with a public officer, as in case of a stipulated salary for his services during a limited period, this, during the limited period, is **just such a contract** within the purview of the constitutional prohibition as a LIKE CONTRACT BETWEEN TWO PRIVATE CITIZENS" 4th Wheat. 518th U. S., 94.

148 When a State descends from the plane of its sovereignty and contracts with proper persons, it is regarded *pro hac vice* as a private person itself, and is judged accordingly." Davis vs. Gray, 16th Wall, 203.

In Railroad Co. vs. Schulte, 103 U. S., 140, the question arose in reference to certain bonds of the State of Florida, issued in aid of certain railroads, and to secure which the State had received the bonds of the railroad, and had reserved a lien upon its property. The Court was called on to settle the respective equities. And in the course of its opinion it says:

149 "And here it is proper to say that contracts created by, or entered into under the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed. Where the State is concerned, the words employed are sometimes to be taken most strongly against the other party, but in this, as in other cases of contracts, language is to be given, if possible, its usual and ordinary meaning. The object is to find out from the words used, what the parties intended to do."

In Chicago Railway Co. vs. the United States, 104th U. S., page 685, in which the Court was considering a contract between the Government and an individual, the Court says
150 as follows:

"Any change attempted by either, otherwise, would have been merely a breach of the agreement, and the United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right."

The case of Tennessee vs. Whitworth, 117 U. S., 131, is
151 very strongly in point. The Legislature of Tennessee had chartered two railroad corporations, and by the charters

exempted the railroad from taxation for twenty years, and the capital stock from taxation indefinitely. The two corporations were consolidated, and the State instituted the suit to subject the shares and property to taxation. The defence was, that the charters were contracts, which could not be violated by the State, and which, properly construed, gave the exemption.

The Court sustained the defence in its construction of 152
the Act, and says, in its opinion:

"This brings us to an examination of the present charter to see what the Legislature has expressed its intention of doing. 'The capital stock of said company' is exempt from taxation. That has been expressly enacted, and the owner or owners of the stock are necessarily relieved from all taxation on this account. The important question is, therefore, who are the owners of the capital stock of this corporation within the meaning of the term, 'capital stock,' as used in this charter, because, *in construing statutes which are binding on States as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted.* 153

IN THIS RESPECT THERE IS NO DIFFERENCE BETWEEN A CONTRACT OF A STATE AND A CONTRACT OF A NATURAL PERSON. If the words employed are capable of more than one meaning, that meaning is to be given them, which, taking the whole statute together, it is apparent the parties intended they should have."

We ask especial attention to this case. Our friends on the other side attempt to avoid the force of the authorities cited, by asserting, that this rule has only been observed in cases where negotiable bonds had been issued, or contracts entered into for the erecting of public buildings, &c. The 154
authorities cited prove the contrary. And in this case of Tennessee vs. Whitworth, the contract was embraced in a charter granted to a railroad corporation, and involved the power of the Legislature to exempt property from taxation.

It is well known, that for a time it was doubted whether such an exemption could be granted. And even now such exemptions, by which the right of taxation is taken from the State are viewed with peculiar strictness, as infringing upon one of the highest attributes of sovereignty upon one most deeply concerning the whole body politic. And yet we 155
see that even in such a case this Court unanimously applied

the rule, that in case of *even such a contract* there is no difference between a contract of a State and a contract of a natural person.

Again; in the late case of Belmont Bridge vs. Wheeling Bridge, 138 U. S., 292, the question before the Court was, as to the exclusive rights and privileges, claimed by the
156 plaintiff under its charter and certain Acts of the Legislature of Virginia. The Court there applies the rule that public grants *without* consideration are to be construed most favorably to the State, but it recognizes fully the principle and exception which we are discussing, by saying:

**"The subsequent general law of Virginia, passed in 1840, prohibiting the Courts of the different counties from licensing a ferry within half a mile in a direct line from an established ferry, *had in it nothing of the nature of a contract. It was a gratuitous proceeding* on the part of the legislature, by which a certain benefit was conferred upon existing ferries, *but not accompanied by any conditions that made the act take the*
157 *character of a contract.* It was a matter of ordinary legislation, subject to be repealed at any time when, in the judgment of the legislature, the public interest should require the repeal.**

But even when the Court does apply the rule that grants, or charters from the State, are to be construed in its favor, they are careful to state that this rule is only to be resorted to when there exists a fair and reasonable doubt.

In The Binghampton Bridge, 3 Wall., 74, the Court while recognizing the rule says:
158

"A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, *a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter.*"

**"It is not the duty of a Court, *by legal subtlety to overthrow a contract*, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascer-
159 tained, effect is to be given to the instrument used, whether it is a legislative grant or not.**

"But if there is no ambiguity in the charter, and the powers conferred *are plainly marked, and their limits can be readily ascertained*, then it is the duty of the Court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts."

The question recently arose in the Supreme Court of Indiana, in the case of Carr vs. State, 26 N. E. Rep., 779.

Certificates had been issued by the State, under an Act of the legislature, and they were before the Court for construction. The Court in the course of an elaborate opinion says: 160

"The certificates were issued under valid legislative authority, and in accordance with duly enacted laws. There is, therefore a complete and binding contract No element is wanting, nor is any incident absent. As there is a perfect contract, the State is bound to perform it according to its legal tenor and effect, and to redeem the pledge it has declared to be irrevocable. IN ENTERING INTO THE CONTRACT IT LAID ASIDE ITS ATTRIBUTES AS A SOVEREIGN, AND BOUND ITSELF SUBSTANTIALLY AS ONE OF ITS CITIZENS DOES WHEN HE ENTERS INTO A CONTRACT. ITS CONTRACTS ARE INTERPRETED AS THE CONTRACTS OF INDIVIDUALS ARE, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a State whenever it enters into an ordinary business contract. 169

Hartman vs. Greenhow, 102 U. S., 672; Poindexter vs. Greenhow, 114 U. S., 270, 5 Sup. Ct., Rep. 903; Keith vs. Clark, 97 U. S, 454; Murray vs. Charleston, 96 U. S., 432; Gray vs. State, 72, Ind., 567; State vs. Cardozo, 8 S. C, 71; People vs. Commissioners, 5 Denio, 401; Penitentiary Cos. vs. Nelms, 71 Ga., 301; Lowry vs. Francis, 2 Yerg., 531; Grogan vs. San Francisco, 18 Cal., 590.

"The principle that a State in entering into a contract, binds itself substantially as an individual does under similar circumstances, necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to anr ul or impair its own contract." 170

Mr. Washburn in his treatise on Real Property, (Vol. 3, Book 3, Chap. 3., § 1, Par. 24, 4th Ed, p. 190,) in stating the principle that grants from the Government are generally construed in its favor, calls attention to the different rule where such grants are *upon consideration*. He says:—

"The strictness of construction in favor of the sovereign, and against the subject, applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. 163

Nor, as it seems, is the rule applicable, **where the grant is for a valuable consideration**. In such case, the rule of construction between the government and the subject is **the same as between private grantors and grantees** And the rule may be stated as a general one, in respect to legislative grants in this country, that **such grants should be construed liberally in favor of the grantee**, and in such a manner as to give them a full and liberal operation, so as to carry out the legislative intent, where that can be ascertained."

164

His Honor the Chief Justice in his opinion on Circuit, rests his decision upon the case of the State vs. Pacific Guano Co., 22 S. C., p. 86, as authority for construing the Act of 1876, now before this Court most favorably for the State, We respectfully submit that an examination of that case will show this to be error.

The act in that case was that of March, 1878, to which reference has already been made. That Act incorporated a number of corporations, not previously existing, and provided
165 that such corporations when organized, should have the exclusive right to mine in certain specified portions of the State's territory, upon certain conditions and upon the payment of a certain royalty. It was a mere Act of Incorporation, conferring certain privileges on the corporations thereby created, *and nothing more.*

for precise wording of this argument see appendix to this argument page 110 fol. 136

There was no pretence that any contract was entered into between them and the State. There was no consideration paid, no rights surrendered, no mutual concessions, creating and supporting a contract. It was a voluntary act of the
166 State, and under its Constitution, Art. 12, Sec. 1, and the General Statutes, Section 1361, tt was subject to repeal or amendment, at any time, at the will of the Legislature. It did not, therefore, come within the principle we have invoked.

The Act of 1878 can, perhaps, be best described in the language of this Court, in Belmont Bridge vs. Wheeling Bridge, 138 U. S., 292, *supra*, as—

"A gratuitous proceediug on the part of the Legislature, by which a
167 certain benefit was conferred on" corporations thereby created, "*but not accompanied by any conditions which made the Act take the character of a contract.*"

It is entirely different from the Act of 1876, which, as we have seen and shall see, was in every respect a contract, made with an existing company, beyond the reach of the Legislature, and for valuable consideration, and for important concessions which could not have been forced from them, but which they voluntarily made, in consideration of the privileges granted them in the Act.

Moreover, the utterances of the Court in that case 168
were, to large extent, *obiter dicta*, because as the Court says in its opinion, the Oak Point Mines Co., the party in interest, was not before the Court at all, either making objections or asking to have its rights adjudicated.

His Honor the District Judge, rests his decision on the case of Slidell vs. Grandjean, 111 U. S.. p. 437. But the Statute before the Court there, was purely voluntary on the part of Congress, passed at the solicitation of private parties, to confirm private claims to public lands. It was 169
absolutely without consideration or pretence to being a contract, and was simply in the nature of a gratuitous grant of public property to individuals, where the ordinary rule no doubt applies. It in no way militates against the other rule laid down in the cases we have cited.

Let us look again at the Act of 1876 in the light of these principles.

Is it a contract? Is it upon valuable consideration? 170

We think we have shown this already. Let us briefly recapitulate.

The Coosaw Mining Company was not a Corporation but a Mining partnership, and as such, not subject to legislative control. It was already in possession, and actual occupation of the entire Coosaw River, and further; had the right to mine in all the other waters of the State in which it was mining, an existing contract with the State, which contract the State could not alter without 171
its consent. Differences had arisen between the Company

and the State as to the construction of that contract which it was desirable to settle.

The Act in its title sets out, that it is to "*settle*"—not prescribe—that is, to amicably arrange existing differences, —and to define the period of making returns, and also to fix the terms on which it might be accepted.

The Act then lays down the terms desired on the part of
172 the State as new terms, to be suggested to the Company, and as constituting a new contract between the Company and the State.

The Act admits that unless consented to by the Company, the terms of the Act would not be binding upon them, and *that it was desirable* on the part of the State, that the Company should accept, and make themselves liable to the terms of the Act.

And the Act further admits that the Company had already expended large sums of money in the purchase of
173 sufficient plant, to mine certain portion of the Coosaw River.

It proposed, therefore, to the Company, that *in consideration of* their accepting the terms stated in the Act, and *in consideration of* the expenditures which they had made, and for the further condition, implied in the Act, that they were to continue to maintain such plant and continue such operations theretofore conducted; that it should have the exclusive right to mine in that part of the Coosaw River, only *so long as and no longer than*, they should make true and
174 faithful returns and pay the royalty prescribed in the Act.

Assuming this to be a contract between individuals, would any question be made as to the right of the Company to continue their mining operations, so long as they fulfilled the conditions contained in the contract.

The Legislature itself recognizes the fact that a consideration has been asked and paid; that both sides have given and taken, and that the terms and conditions of the contract as expressed in the Act are therefore binding on both
175 sides.

Is not this, therefore, a contract, based upon *valuable con-*

sideration, paid to the State by the Company? If so, then, under the cases cited, it must be construed as though the contract was made between individuals.

And if it is, then it must be construed in favor of the Company, for *the only gronnd upon which the Court below rested its decision* in favor of the State, was that it must be construed liberally to the State, and all doubts resolved in her favor. 176

3. Was the Consideration Adequate?

We submit, that this was a matter solely for the determination of the Legislature, behind which the Courts will not attempt to go. 177

This rule rests upon two principles, both of which are firmly established by the repeated decisions of our Courts.

The *first* is that in relation to contracts made by the Legislature in the shape of Acts or otherwise, the Courts will not attempt to look into or revise the motives which induced its passage.

This rule is well stated by the Court of Appeals of New York, in People vs. Draper, 15 N. Y., 532–545, as follows: 178

"**We are not made judges of the motives of the Legislature,** and the Courts will not usurp the inquisitorial office of inquiring into the *bona fides* of that body in discharging its duties.

"The powers of the three departments are not merely equal; they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. It is now proposed that one of the three powers shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the Legislature were governed in the enactment of a law. If this may be done, we may also inquire by what motives the Executive is induced to approve a bill or withhold his approval, and in case of withholding it corruptly, by our mandate compel its approval. To 179 institute the proposed inquiry would be a direct attack upon the

independence of the Legislature, and a usurpation of power subversive of the Constitution."

In this Court the same principle is established. In Ex-Parte McCardle, 7 Wall., 514, Chief Justice Chase pronouncing the opinion of the Court, says:

"We are not at liberty to enquire into the motives of the legislature. We can only examine into its power under the Constitution."

180

And in the case of Doyle vs. Continental Ins. Co., 94 U. S., 541, the Court says:

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it, cannot be inquired into."

And in United States vs. Union Pacific R. R. Co., 91 U. S., p. 91, this Court says in considering the hardships which an enforcement of the contract according to its terms might work to the Government:

181

"Counsel have dwelt with special emphasis upon the consequences which would result from a decision adverse to the appellant. We cannot consider them in disposing of the questions arising upon this record. The rights of the parties rest upon a Statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. **We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended.**"

So in Holbrook vs. Holbrook, 1 Pick., 249, the Supreme
182 Court of Massachusetts, says:

"Whether it is a wise or salutary provision or not is a question for the consideration of the Legislature, and not within the province of the Court to determine."

And the *second* principle, equally well founded is, that when there is any consideration at all for a contract, the Court will not in the absence of fraud inquire into its sufficiency. It is left to the parties, to make their own bargains.

183 Judge Parsons in his treatise on the law of Contracts, Vol. 1, p. 436, Book II, Chap. 1, says:

"If the consideration be valuable, **it need not be adequate**; that is, the Court will not inquire into the exact proportion between the value of the consideration, and that of the thing to be done for it.

"The Courts, both of law and of equity, refuse to disturb contracts **on questions of mere adequacy** whether the consideration is of benefit to the promisor, or if injury to the promisee."

The principle is settled in South Carolina. In Gibbes vs. Wilson, 1 Bailey, L., 599, the Court says:

184

"**It is not the business of Courts to protect parties from the consequences of bad contracts,** but to protect them from the consequences of either legal or moral fraud and imposition."

And this Court has applied and enforced this principle, in a case exactly similar to the one now before it. In Louisville Gas Co. vs. Citizens' Gas Co., 115 U. S., 698, 699, the Court was called on to construe an Act of the Legislature of Kentucky, which it was claimed was a contract between the State and the corporation and under which, for valuable consideration, exclusive rights—*a monopoly*—was 185
claimed by the corporation to supply the city with gas. The question of consideration was raised, and says the Court, p. 698:

"It is argued that as the defendants' charter of 1867 conferred upon it no exclusive privileges, the granting of such privileges in the Act of 1869 was without consideration and is to be deemed a mere gratuity."

The Court then proceeds to discuss the considerations, as stated in the Acts, and to show how while the obligations of the corporation were enlarged, its rights under the Act of 1867 were in certain particulars materially lessened by 186
the Act of 1869. And says, p. 699:

"These concessions upon the part of the company **seem to be of a substantial character, and constituted a sufficient consideration to uphold the grant of exclusive privileges. If the consideration appears now to be inadequate, upon a money basis, that was a matter for legislative determination, behind which the Courts should not attempt to go.**"

But if we are wrong in the application of this rule we submit with confidence that the considerations given by 187
the company were amply adequate.

And in considering them we must bear in mind that we must look at them as the Legislature regarded them then, in the light of and surrounded by the then existing circumstances, and not as we would look at them now. . One of two parties to a contract, after receiving and enjoying the consideration which he was eager to obtain, and which was most valuable at the time, afterwards regrets that he
188 did not ask for more. But that does not affect the validity, or the absolute good faith, of the contract as made.

We must remember that at the time that this contract was made, this phosphate industry, afterwards so largely developed chiefly by the instrumentality of the appellants was in its struggling infancy, and had hardly passed its experimental stage. Of the six companies which had embarked in it none had paid any return to the investors save a small dividend by the appellants, and nearly all were in embarrassed circumstances. That as matter of
189 fact nearly all of them subsequently failed and went out of the business. (Record. p. 43.)

The first and greatest consideration to the State was, therefore, to encourage those who were risking their money in her territory to develop it and make it valuable. Remember that the State was without means herself to develope these deposits. She was putting in no money, risking no capital—all that she was giving was concessions. She stood to lose nothing,—to make everything. If the
190 experiment failed, she lost no money, but only expectations. If it succeeded she gained a most valuable acquisition to her resources, and a large annual income.

It was, therefore, of immense value to the State to encourage, by all means in her power, the continued and enlarged operations of her tenant-miners. And their acceptance of the terms of the Act and their continued and enlarged operations carried on by them, under and because of, the concessions of the Act, constitute the amplest considerations for them all.

191 The Legislature, therefore, said to the Coosaw Company and to the other parties mining, that in consideration of the

fact that they had invested large sums in mining plant, and were occupying certain portions of the territory, and on the further consideration, plainly implied, that such plant should be efficiently maintained, and such occupancy and mining operations should continue, and further, upon payment of royalty on every ton, they should, on accepting the terms of the Act have the exclusive right to mine in the portions of territory so severally occupied, so long as 192
and no longer than they made returns and paid the royalty.

The Coosaw Company accepted the terms. They did more; they not only continued their then plant in its full efficiency, but in consideration and because of the continuing provisions of the Act, they expended a quarter of a million of dollars in additional plant, thus adding largely to the development of the State's territory and to her annual royalty derived therefrom. (Record, p. 45.)

As a result of such increased operations then this en- 193
larged plant, this royalty which, during the six years previous had amounted to less than $75,000 during the fourteen years following amounted to nearly one and one quarter million dollars. (Record, p. 46.)

Was not this alone of itself a sufficient consideration? Can the State, after accepting these benefits, put in the plea of *nudum pactum*?

A similar question as to the consideration for exclusive 194
and indefinite or continuing privileges was before this Court in New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., p. 663. Here is the view which they took of the matter, and the principles which they laid down.

"The purposes to be obtained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the Government to provide for them; and, as **experience has proved that a State should not directly attempt to do this, it is necessary to** 195
confer on others the faculty of doing what the sovereign power is

unwilling to undertake. The legislature, therefore, says to public-spirited citizens: '**If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money,** and the employment of your time, and skill.' **Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.**" See also West River Bridge Co. vs. Dix, 6 How. 507, 531.

196 "The same principle was declared by the Supreme Court of Louisiana in **Pontchartrain Railroad Co. vs. Orleans Navigation Co.**, 15 La. Ann., 404, 413, where Chief Justice Martin said:

"In the same manner as Congress may reward the discoverer of a new invention or mode of constructing roads, by an exclusive privilege, the legislature may reward those who employ their capital and industry in doubtful enterprises, for the construction of a railway between two points, which may be of great utility to the public, though the success of the enterprise may be precarious." See also, **Pontchartrain Railroad Co. vs. New Orleans Railway Co.** 11 La. Ann., 253; **Pontchartrain Railroad Co. vs. Lafayette & Pontchartrain**

197 **Railroad Co., ubi supra.**

And in **Crescent City Gas Light Co. vs. New Orleans Gas Light Co.**, the Court said: "as the legislature had the right in 1835 to grant the sole and exclusive privilege to the defendant company to make and vend gas in New Orleans for forty years the legislature of 1870 had the same power to confer on the plaintiff **the same privilege for fifty years from the termination of the grant to defendant.** We therefore, conclude that the grant of the monopoly complained of does not violate the constitution and is valid."

And again at page 670 and 671, in speaking of the case then before the Court, in which exclusive privileges were

198 granted the corporation in consideration of services which it was to render, this Court says:

"In order to accomplish what, in its judgment, the public welfare required, the legislature **deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege** of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable, either, that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or

199 the public would have been deprived of the security in person, property, and business which comes from well lighted streets.

"It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested."

"For it can never be maintained in any tribunal in this country, that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than that fixed by the constitution of the United States, **upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is** the foundation of our political institutions.

200

"After observing that the power of the State to make contracts may be indiscreetly and, for the public, injuriously exercised, the learned Judge proceeds: 'yet if the contract was within the scope of the authority conferred by the Constitution of the State, **it is like any other contract made by competent authority, binding upon the parties.** Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this Court to carry it into execution. That duty must be performed."

201

That this investment of capital was one of the main considerations for this legislative contract, was admitted by Attorney-General Conner in his opinion to the Legislature, where he says, (Record, page 83.) speaking of the Act of 1876:

"The evident intent and object of the Act was to grant exclusive privileges in certain localities, as a bonus **and protection** to those companies which had expended money, and obtained a quasi-vested interest, in such localities and to insure to them the advantages of the capital thus invested.

"The basis of the exclusive grant to the Coosaw Company is that 202
they had occupied so much of the Coosaw River as lies opposite to and south of Chisolm's Island, had located themselves there, and had expended large sums of money in establishing themselves thereon with sufficient mining plant, and therefore **in consideration thereof,** the Act goes on and grants the exclusive right.

"If the investment of capital in a location and establishing themselves thereon with a sufficient mining plant for mining and preparing for market the phosphate rock, **is one consideration of the grant of exclusive right, then it follows that where the consideration does not exist the grant does not take effect."**

Let us remember again that when this Act of 1876 was 203
passed, the State had already granted to sundry individuals

and corporations the right to mine indiscriminately in all her navigable waters. The evils resulting from this method are fully set out in the Record, (page 42) The best interests of the State required that this should be changed and the miners restricted to fixed and definite localities.

That this was the true policy of the State is most fully shown in the report and opinion of Attorney-General Con-
204 ner to the Legislature (Record, pages 89-90) He there sets out fully the evils of the general rights system and the advantages of the other.

But the State could not adopt this system of fixed localities without the consent of her grantees, some of whom being individuals, and foreign corporations, and holding legislative contracts, were beyond the reach of the Legislalature. These contract rights could not be impaired, nor while they lasted, could exclusive rights to any given local-
205 ity be granted to others.

It was therefore most "*desirable*" as the Act of 1876 states, that all persons holding these general mining rights from the State, should accept the terms of that Act, and thereby surrender them, in exchange for exclusive continuing rights, in certain fixed localities, leaving the State free to farm out the balance of her territory as she saw fit.

This actually took place. The surrender was made and accepted, and by the Act of March, 1878, the State parcelled out the remaining territory, so surrendered in exclu-
206 sive grants, to numerous companies.

Was this not a valuable consideration given to and accepted by the State, for the rights conferred by the Act of 1876?

That this was the true condition of the phosphate industry in South Carolina, is sustained by an examination of the report of General Conner, so often referred to, and forming part of the record. He reports fully to the Legis-
207 lature the disadvantages resulting from the general right system, which had up to that time prevailed, and he strongly

urged upon the Legislature the necessity of adopting the exclusive right system, which had been first inaugurated by the Act of 1876. Record, pages 89, 90, 91 and 92.

True, he criticises this Act in some particulars as not being as favorable to the State as it might have been, but it will be remembered that he was dealing with the industry after two years of operations under the Act of 1876, and when its benefits had been already experienced. 208

At that time (1878), and *because of the Act of 1876*, the State was in the position, which it did not occupy until that Act was passed and accepted, of controlling the phosphate territory and adopting the exclusive system which Gen. Conner recommended. In other words, *if it had not been for the Act of 1876, and the system inaugurated by it, and accepted by the mining companies, and the surrender of their general rights, the State would have been powerless to adopt the recommendation of General Conner, and proceed* 209 *under the exclusive right system.*

Having obtained the control of its territory, through the intervention of the Act of 1876, and the acceptance of its terms by the phosphate companies, the State was then in position in making new grants, to demand much better terms of those seeking to enter its territory, than it could ask in 1876 from those who were in possession under valid contracts.

It was only another instance of one making a contract at one time, by which he has placed himself in a position to 210 make much better contracts with other people later on. If he had not made the first, he could not have made the second.

It is very easy now, and it was very easy for General Conner, to criticise the action of the Legislature of 1876 as unwise, in granting a continuing right, and to claim, in the light of subsequent events, that no such right could have been intended. But in construing statutes we must look at them in the light of circumstances existing at the time of their passage. 211

The motives which governed the Legislature in offering

advantageous terms, at a time when an infant industry was struggling for existence, cannot be controlled or governed by the condition of things existing years afterwards, when that industry had become thoroughly established and flourishing.

To use the words of this Court, in Platt vs. Union Pacific R. R., 99 U. S., pp. 60–63 :

212

"All will concede, that in construing the Act of 1862, we are to look at the state of things then existing, and in the light then appearing, seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the Congressional intentions.

"There is always a tendency to construe statutes in the light in which they appear when the construction is given. **It is easy to be wise after we see the results of experience.** We may now think it quite possible that the lands could all have been sold before July 1, 1877. **The unforeseen success of the enterprise**, and the unprecedented rush of emigration along the line of the railroad **have shed new**

213 **light upon the value of the grants made to the Company.** But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, **place ourselves in the light that Congress enjoyed;** look at things as they appeared to it, and discover its purpose **from the language used in connection with the attending circomstances.**"

Besides, in considering the report of Attorney General Conner, it must be borne in mind that so far as his examination of the law is concerned, and his report thereon, it was entirely *ex parte*. He was the State's counsel, looking into the

214 matter on behalf of the State, and, of course, presumed to take as favorable a view of the matter, in the interest of his client, as he well could.

While his report shows that he examined those engaged in the business, as to the best method of conducting it, he heard no argument from those interested as to their rights, under the Act of 1876, or the other Acts of the Legislature. That is to say, he did not sit judicially, notifying the parties to appear before him, and submit their views as to their respective legal right, but simply as a lawyer, he examined the

215 legal questions for himself, at the request of his client, and gave them the opinion before the Court as to their right. His

opinion is of no more binding value than that of Mr. McCrady's also before the Court.

It scarcely seems to us necessary to consider any further considerations than those already referred to.

But we may remember as additional considerations, that the State by this Act restricted the general and indiscriminate right then enjoyed by the Companies, to roam at will over her territory and glean where and as they pleased from her phosphate deposit, and required them to confine their mining operations to limited and fixed areas, where the work would be done systematically under constant supervision. 216

The agreement to pay the royalty *annually* was changed and payment required *quarterly*.

The uncertain power of the State to forfeit the existing rights was changed and made clear and definite by providing that the rights should exist, *only so long as and no longer than*, the returns were made and the royalty paid as required. 217

A large amount of royalty not due for months to come was paid down at once, and in cash into the State Treasury.

The Coosaw Company relinquished its right and claim under its agreement with Williams and others under the Act of 1870, to the whole of the Coosaw River, and retained only a part. And the State accepted the surrender, and by the Act of March, 1878, granted to the Farmers' Phosphate Company, the exclusive right in and to the portion of the river so surrendered.

This proved a most valuable territory. and has been for many years worked by the Farmers' Company and others. 218

It is unnecessary to prolong the examination already fully made of the considerations required to be given and given by the Companies accepting the terms of this Act.

We confidently submit that even if the Court should feel free to examine into the sufficiency of the consideration, judged sufficient by the legislature, that its scrutiny will only result in showing that it was ample and abundant. 219

4. ACTS CONSTRUED IN PARI MATERIA.

We submit that the established principle is, that while recourse may be had to the doctrine of in pari materia to resolve a doubt, it can never be called into action to create a doubt.

That when the wording of a Statute is clear in itself and
220 *leads to no absurd conclusions, that it is not allowable to go elsewhere in search of conjectural constructions.*

That when there is a difference between an older and a junior Statute, especially where the latter has a repealing clause, it is presumed that the legislature intended that there should be a difference and the prior Act must be considered repealed.

The first principle above stated is clearly enunciated by Mr. Endlich in his work on the Interpretation of Statutes.
221 In discussing the rule of construing Acts *in pari materia*, he says (Section 53):

"The purpose of the rule of construction under discussion, is of course, like that of every other, to elucidate the meaning of a given Statute. The effect is to preserve harmony and consistency in the entire body of the legislation upon a given subject matter.

The statement of the rule, however, as flowing from these propositions, carries with it its own limitation. It is clear, that where the Statute under construction, taken by itself, viewed in the light of the objects it is intended to attain, and applied to the subject matter it effects, evinces a design to depart from the general and previously existing system of legislation thereon, **or to use words in a sense different from that in**
222 **which they are used in other Acts on the same subject, this intention cannot be defeated, and the rule therefore, is in such case inapplicable. In other words, where the language of the Statute is plain and explicit, it cannot be controlled by the rule in pari materia.**"

In ex parte Blaiberg in re. Toomer, Law Reports, 23 Ch. Div., 258, the Court was called on to construe an Act of Parliament under consideration, *in pari materia*, with a prior Act relating to the same subject.

But Jessel, M. R says:

223 "I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions

upon the former Act. Any other course would be apt to lead us astray. If the latter Act can clearly have only one meaning we ought to give effect to it accordingly. **If instead of doing that we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former Act, we might in that way go back to half-a-dozen older Acts, and after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act."**

And after discussing the sections of the Act he further says: 224

"It appears to me that this is the plain meaning of Section 8, and **there is no occasion for us to go back to the words of the former Act."**

And in his concurring opinion in the same case, Lindley, L. J., says, in commenting on the different wording of the Sections in the earlier and the later Acts:

"Why the language has been altered I do not know, **but it must have been altered to effect some object."** 225

In People vs. Utica Ins. Co., 15 Johns, 330, the Court of Appeals of New York, in construing the charter of the defendant, under Act of the Legislature, says:

"That in construing a Statute the **intention** of the Legislature is a fit and proper subject of inquiry is too well settled to admit of dispute. That **intention,** however, is to be collected from the Act itself, and other Acts, **in pari materia.**

"**Where any words are doubtful** the **intention** of the Legislature is to be resorted to in order to find the meaning of the words."

This Court has also recognized the same principle. See 226
5596 of the Revised Statutes of the United States, provides that all Acts of Congress, any portion of which is embraced in the revision, are repealed, &c.

In United States vs. Bowen, 100 U. S., p. 513, the question before the Court was as to the right and duty of the Court to consider the original Acts, *in pari materia*, with the revision to arrive at the true interpretation. And the Court says:

"Counsel for Government admitting that it is no longer in force, 227
independently of the section of the revision which we are called on to

construe, insist that a **resort may be had to the law which was the subject of revision, to interpret anything left in doubt by the language of the revisers.**

This principle is undoubtedly sound; and, where there is a substantial doubt as to the meaning of the language used in the revision the old law is a valuable source of information.

When the meaning is plain, the Courts cannot look to the Statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in
228 expressing the meaning of Congress."

Again in Arthur vs. Dodge, 101 U. S. p. 36, the Court affirms the case quoted and says:—

"In the **United States vs. Bowen,** (100 U. S. 508,) we held that the Revised Statutes must be treated as a legislative declaration by Congress of what the Statute law of the United States was Dec. 1, 1873, on the subjects they embrace, and that **when the meaning was plain, then Courts could not look to the Statutes which have been revised to see if Congress erred in that revision.**"

229 And again in Victor vs. Arthur, 104 U. S. p. 499, the Court again reiterates the rule saying:—

"In **United States vs. Bowen,** (100 U. S. 508,) we held that the Revised Statutes must be treated as a legislative declaration of what the Statute law of the United States was on the 1st of December, 1873, and that when the meaning was plain the Courts could not look to the original statutes to see if Congress had erred in the revision. **That could only be done when it was necessaay to construe doubtful language.** We applied this rule in **Arthur vs. Dodge,** (101 id. 34,) to the construction of the revision of the tariff laws."

230 This principle is laid down by the Supreme Court of South Carolina, in the case of the State against Thompson, 18th S. C., page 542, where the Court says:

"We have the power to construe doubtful and analogous phrases, or words brought before us so as to reach its true intent and meaning, BUT WE HAVE NO POWER TO INTERPOLATE OR INSERT WORDS NOT USED. Especially would we be restraind in a case like this, when the words in question are EXPRESSLY INCORPORATED IN ONE SECTION OF THE STATUTE AND LEFT OUT IN THE OTHER.

231 And in the case of Butz vs. Muscatine, 8th Wallace, p. 580, the Supreme Court of the United States says:

"WE CAN NOT INTERPOLATE A RESTRICTION BY IMPORTING IT FROM ANOTHER ACT WHICH HAS NO NECESSARY RELATION TO THE CLASS OF CASES FOR WHICH THE CODE INTENDED TO PROVIDE."

Under this principle therefore if we find that the language of the Act of 1876, is plain and explicit, we cannot resort to the Act of 1870, or any other Act, to interpolate any word or clauses, and it cannot be controlled by the rule of *in pari materia*. 232

The next principle that where the wording of a Statute is clear it is not allowable to go elsewhere in search of conjectural constructions, is almost axiomatic.

It will be sufficient to quote the rule as stated by Chancellor Kent, in Vol. 1, of his commentaries, p. 462, as follows:

"The current of authority at the present day, said Mr Justice Bronson, is in favor of reading Statutes **according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation.**" 233

The other principle or limitation on this doctrine of construing Acts *in pari materia*, that where there appears a difference between an older and a junior Statute, and especially where there is, in the latter, a repealing clause, the presumption is that the legislature intended that there should be a difference is also fully settled.

Endlich Interpretation of Statutes, Sec. 582, states the 234
rule:

"The words of a Statute, when unambiguous, are the true guide to the legislative will. **That they differ from the words of a prior Statute on the same subject,** is an intimation that they are to have a **different** and not the **same** construction, **for it is as legitimate a use of the legislative power to alter prior Statutes as to displace the common law.**"

In Leddie vs. Navigation Co., 6 Pa, St., 392, a charter had been granted the defendant, under which they were to report to the Governor, when twenty miles had been com- 235
pleted, who should have the same examined to see if it

were properly done, and on this being ascertained, might authorize the company to collect tolls.

In a supplemental charter it was, among other things provided, that when the navigation, or any portion thereof, shall be completed, the company should be authorized to receive reasonable tolls.

236 It was contended that the Acts should be construed *in pari materia* and that the Governor should still first inspect before tolls could be collected. But the Court says:

"The supplement to the Act entitled 'An Act to authorize the Governor to incorporate a company to make a lock navigation on the river Monongahela,' passed the 24th June, 1839, was a direct grant and charter from the Legislature. It repealed all portions of the original Act, which the supplement altered and supplied.

"The supplement changed the plan of executing the work, and authorized the company to demand and receive toll without the license of the Governor.

"The Legislature has laid down a plain rule, and it becomes the
237 duty of the people using the navigation to obey it. It is the province of the Courts to enforce that obedience."

In Rich vs. Keyser, 54 Pa. St., p. 88, the Court had before it two Acts in reference to the landlord's right to retake possession of his premises. The first Act provided for ejectment if "demand had been made of the lessee to leave the premises, three months before the application to the justice"

The later Act, on the same subject providing for ejectment, used the words: "having given three months' notice
238 of such intention to his lessee or tenant."

It was contended that the two Acts being on the same subject must be construed together, and so construed that they should not be held to mean different things, but be harmonized.

The Court, however, said:

"Herein the Act of 1863 plainly differs from that of 1772. Was the discrepancy accidental or intentional? The Legislature of 1863 must be presumed to have known what the language of the Act of 1772 was, and what judicial construction had been placed upon it.

239 Then, knowing this, and yet not following it, but **substituting for it different language did they not mean that we should construe their**

language according to its ordinary import? I see no other ground for judicial construction to rest upon. Indeed, the words of a Statute when unambiguous, are the true guide to the legislative will.

That they differ from the words of a prior statute on the same subject, is an intimation that they are to have different and not the same construction for it is as legitimate a use of the legislative power to alter prior statutes as to displace the common law."

And the principle of the case is thus stated by the Reporter: 240

"The words of a statute when, unambiguous, are the true guide to the legislative will. That they differ from the words of a prior statute on the same subject is an intimation that they are to have a different construction."

In the case of Martz's Election, 110 Pa. St., 502, the Court was construing two Statutes on the same subject.

The principle of the case is thus stated;

241

"Where all the essential provisions of a special Act of Assembly are supplied by a later Act, the former will be deemed to have been repealed by implication, although there is no repealing clause."

And the Court, in its opinion, says:

"The question is, what was its effect upon the previous special legislation? Did it supply the Act of 1853, and therefore repeal it by implication; or are the two Acts **in pari materia**, and not so inconsistent that both may not stand? As we have seen, the Act of 1862 provides, in the first place, for the election of six supervisors by the qualified voters of the township at large, at first election after its passage. In 242 the next place, it makes it the duty of the six supervisors thus first elected, to divide the township into six districts, neither of which is required to correspond with either of the old districts, and in the third place each of said new districts is entitled to have elected therein one supervisor. As we understand it, the Act does not mean that each district is entitled to elect its own supervisor, but to have him elected by the qualified voters of the whole township.

The provisions of the Act are incompatible with the continued existence of the old districts as they existed under the Act of 1853, as well as with the former mode of electing supervisors to represent them respecitvely. The Act of 1853 being thus supplied as to all its essential provisions, by the Act of 1862, was superseded, and, by necessary 243 implication, repealed."

In U. S. vs. Collier, 3 Blatch C. C., page 332, the Court, in construing a Statute, says:

"Generally, a statutory enactment **controls all prior usages and laws, and establishes the rule which governs the subject matter;** and its language is to be understood according to its natural and ordinary import."

244 In Livingston vs. Harris, 11 Wend., 334, the Court says speaking of a subsequent act:

"It is like the passing of a law, inconsistent with some of the provisions of a pre-existing Statute. **The last act is an implied repeal of the first,** so far as these provisions are incompatible with each other, but leaving the original law in full force and effect in all other respects."

In Dash vs. VanKleeck, 7 John, 497, the Court says:

245 "It is an undeniable rule of construction, that a subsequent Statute **making a different provision on the same subject,** is not an explanatory act, but an implied repeal of the former which is precisely the case here."

In Manufacturing Co. vs. Vanderpeel, 4 Cowen, 559 the Court says:

"At all events, if the subsequent provisions of the Act are so clearly contrary to the act of 1817, that the repugnancy could not have escaped the attention of the legislature; so contrary, as to show that
246 they must have known the latter virtually repealed the former, **it would be doing violence to the principles of sound construction applicable to statutes, to sustain a law which the legislature had thus clearly manifested their intention to repeal,** upon the strength of so questionable a clause as that relied upon."

And, quoting again from Endlich, he says:

SEC. 206. "Where a Statute contemplates, in express terms, that its enactments will repeal earlier Acts, by their inconsistency with them, the chief argument or objection against repeal by implication
247 is removed, and the earlier Acts may be more readily treated as repealed."

SEC. 207. "Not only does the grant of a power by the Legislature inconsistent with a former one repeal the latter, but in general, the grant of a power conditioned on different things," "the latter was held to repeal the former."

SEC. 234. "It has been said to be a rule that one private Act of Parliament cannot repeal another except by express enactment; but necessary implication must no doubt be considered as involved in this expression, if the intention of the Legislature be so manifested."

"If the latter of the two Acts be inconsistent with the continued 248
existence of the earlier one, the latter must inevitably be abrogated. And in a late case it was held that where all the essential paovisions of a special Act, and the provisions of the latter Act were incompatible with the continued existence of those of the earlier one, the latter must be held repealed by implication although there be no repealing clause in the more recent Statute"

A similar case to the one before the Court is New Jersey vs. Yard, 95 U. S., 112. The original charter of the Morris & Essex R. R Co., in 1835 exempted it from taxation until seven per cent. was earned on its capital. By Section 20 249
the Legislature reserved to themselves the right to alter, amend or repeal this Act, whenever they thought proper.

By an amendatory Act passed the next year, the right was reserved to amend &c., whenever the public good might require it.

In 1865 another Act was passed enlarging the capital and extending branches for the R. R. but providing that it should be taxed ½ of 1 per cent. And the Act required that the R. R, *should accept its terms* within 60 days. The R. R. accepted the terms of this Act, (just as the Coosaw 250
Co. accepted the terms of the Act of 1876) and the State afterwards sought to change it.

The Court says:

"The argument is, that the original charter, and all subsequent amendments and supplements **are to be treated merely as parts of one Act**, and that this reserve of the right to alter or amend **became a part of every new law** which has reference to that railroad company.

"They announce the general principle that a charter and its amendments are to be considered as acts **in pari materia** in construing them, and they do little more The precise point held is, that a 251

city charter, being declared to be a public act, supplements and amendments to it are also to be treated as public acts. But this falls short of establishing the principles that a reservation in a charter to a private corporation of the right to appeal or amend it, **shall extend to every subsequent amendment of the charter** It is not easy to see why such a provision should be extended beyond the terms in which it is expressed; and all the force which properly belongs to it is given when the exemption from the constitutional provision against impairing the obligation of contracts **is extended as far as**
252 **the language of the exemption justifies, and it should be extended no further by implication.**

"The Legislature **was not willing to rest this contract in the usual statutory form alone**, depending for its validity as a contract upon some action of the corporation under it to bind it to its terms; **but they required of the company a formal written acceptance within sixty days, or else it became wholly inoperative. The company duly executed this acceptance.**

"It does seem as if the Legislative intention was to make a contract in the same manner, and on the same terms of equal obligation as other contracts are made, and not to pass a statute which it
253 could repeal or amend the day after it was signed by the parties.

"There **was a well-understood subject of contract**. **The corporation wished authority to build a branch road or roads**, with favorable route, and power to acquire right of way; and the **State wished the vexed question of the right to tax the corporation to be settled.** For the company denied the right of the State to tax them under their charter, until the road paid them a net income of seven per cent. per annum on its cost.

"The Legislature **said, if you will consent to pay the one-half of one per cent. taxes** originally agreed, and commence to do this within one year from the time the road shall be open and in use to Philipsburg, **we will authorize an increase of ten millions of your capital stock** and the franchises you seek as to the branch roads, and will
254 agree that the tax shall be fixed at one-half of one per cent. **Here was a subject of disagreement adjusted, additional rights granted, and the tax fixed, both as to its rate and the time of a commencement.**

"The language used by the Legislature is inconsistent with the right claimed. (To revoke.)

"Which tax (one-half of one per cent.) shall be in lieu and in satisfaction of all other taxation or impositions whatsoever by or under authority of this State, or any law thereof. Is there here **to be implied**, 'except such laws as may hereafter be enacted?' Such **a** provision would be to nullify the whole contract."

255 We submit as a conclusion from these authorities, that while repeals by implication are not favored, yet earlier

Acts are necessarily repealed by later ones, in so far as their provisions are inconsistent.

And this especially when the Act gives special, rights to certain parties, and where it is conditioned on things different from the former Act.

These rules apply even where there is no repealing clause. Where there is, all objections are removed, and the later Act takes the place of the former one. 256

That is to say, where the Legislature in the later Act uses different words, and adds a repealing clause, it is presumed that the Legislature knew its own intention, and intended a difference.

That the rule of construction *in pari materia* is resorted to for the purpose of ascertaining the meaning of a statute, when explanation is necessary, either because of seeming conflict in its own provisions, or incompleteness of detail in its subject matter, a doubt as to the sense in which uncertain 257 words or phrases are used. In such cases, and to preserve harmony and consistency, the rule is resorted to.

But the rule carries the limitation, that where the statute is itself plain, the rule cannot be resorted to, nor can its clear language be controlled by the supposed policy of a former one.

Therefore where the words of a Statute are not doubtful, these words are the best guide to Legislative intention, and if they differ from former Acts, it must be held that the legislature in using them, intended that there should be a 258 difference.

5. IS THE ACT OF 1876 CLEAR IN ITS MEANING.

We submit that the wording of the Act is clear and plain, and of itself, suggests no doubt as to its proper construction. 259

That therefore the rule of in pari materia is not applicable,

and that to go elsewhere in search of conjecture, in order to explain or restrict it, is but elude its evident and plain meaning.

In the first place it is evident from the very terms of the Act, that the legislature set out to make changes in the then existing law. The avowed purpose of the Act of 1876, was to alter and change existing legislation, in other words to re-
260 peal or modify it.

We must expect therefore to find changes, and differences, and our only duty is to ascertain what these changes are.

The Act begins by setting out that there were differences between the Coosaw Mining Co., and the Comptroller, as to the manner of making returns, and as to the times of payments of royalty and therefore to remedy the same it provided, how in future such returns should be made, and when and how the royalty should be paid, changing both times and
261 dates of making the returns and the times and dates of payments of the royalty in favor of the State. It further provided that the Coosaw Company and *all other persons* accepting the Act should enter into new bonds and should also anticipate the payments on royalty paid to the State Treasury accrued up to the first of March of that year.

The Act then states that it is *desirable* that the Coosaw Mining Company and all other Companies and persons should accept the terms of the Act in order to make it binding upon
262 them respectively, thereby admitting that excepting by and with the consent of the Coosaw Mining Co., and the other persons interested they could not change the existing contract. And admitting that it was the interest of the State, that these companies should surrender the rights they then had and accept those tendered by the Act. Why, unless there were material changes?

The Act further recites the large investments already made by the Coosaw Mining Co., (and other occupants) of a certain
263 part of the Coosaw River, and their establishment therein with sufficient plant for mining and preparing for market the

phosphatic deposits therein contained; recognizing not only what the Coosaw Company had already done in the way of investment but also inserting the plain and evident condition, that the Coosaw Company was to continue, not only its operations on the then scale, but were also obligated to keep in the river a plant sufficient to carry on such mining operations.

264

Under these recitals the Act goes on as follows :—

"Section 3. That the said Coosaw Mining Company **on accepting the terms of this Act** within ten days from the passage thereof, shall **thenceforth have the exclusive right to occupy and dig, mine and remove,** phosphate rock and phosphatic deposits from that part of Coosaw River above mentioned so LONG AS AND NO LONGER THAN they shall make true and faithful returns of the number of tons thereof they shall so dig, mine and remove and ship or otherwise send to market, and punctually pay the royalty thereon as provided in the first section of this Act."

265

And it further provides in its next section, that *all other persons* engaged in mining *who should accept the terms* of the Act within ten days from its passage, should have the same exclusive rights where they have respectively "occupied portions of the State's territory."

And Section 5 of the Act provides that "all Acts or parts of Acts inconsistant with this Act be, and they are hereby, **for the purpose of this Act repealed**."

266

We repeat, therefore, that the Act sets out expressly to make alterations and changes in the existing law, and in order that there might be no question or doubt as to this purpose adds the clause repealing all Acts or parts of Acts inconsistent with the provisions of this Act.

It seems impossible to add by way of argument anything which would make more clear, or more plain, the declaration in the Act sustaining the claim of the defendants to the continuing right to mine, in Coosaw River, than the 267
words above quoted, to wit :

"That upon accepting with the terms of the Act they should have exclusive right to **occupy** and mine in said River, "**so long as and no longer than**" **they** should make true and faithful returns of the number of tons, and punctually pay the royalty thereon."

Upon this the defendants stand. They have made true and faithful returns, and have punctually paid the royalty on the rock mined, as provided in the section of the Act,
268 and having so done, they claim the right to continue to dig, and to mine in said territory, "*So long as and no longer than*" said conditions shall be fulfilled.

If it be necessary to cite authority to sustain so plain a position that the words "*so long as*" mean an indefinite—not a permanent, but an indefinite period—we refer to the case of the Market Company vs. Hoffman, 101 U. S, p. 115.

There the Court was considering whether the occupants of certain stalls in the market, held them for a limited
269 period, or had the right to occupy such stalls indefinitely, or "*so long as*" they choose to carry on their business, provided that they paid the rent as it should, from time to time, become due. The Court, in considering the words of the Act and holding the period limited, says, in indicating what terms would have been sufficient to effect an indefinite and unlimited tenure:

"The prescription to sell for **one or more years** negatives this. HAD IT BEEN INTENDED that the sale should confer upon the highest bidder THE RIGHT TO OCCUPY A STALL AT HIS WILL SO LONG AS
270 HE MIGHT USE IT for his business, THOSE WORDS would not have been inserted in the Statute. They would be unmeaning, even more, they would have been contradictory to the intent. IT WOULD HAVE BEEN SUFFICIENT to declare that the stalls should be sold at public auction, and that the highest bidder should have the right to hold SO LONG AS he chooses to occupy for his business, and pay rent. We are not at liberty to construe any statute so as to deny effect to any part of its language."

We do not see how words can be stronger. The Supreme Court of the United States in effect says in this case, that "if it had been intended that the Act of 1876 should confer
271 upon the Coosaw Company the right to occupy the Coosaw River at their will and *so long as* they might use it, for their

business, it would have been sufficient to declare that they should have the right to hold *so long as* they choose to occupy it for their business and pay rent."

When we turn to the Act of 1876 we see that the Legislature has said that the Coosaw Mining Co. should have the exclusive right to occupy the Coosaw River, and mine and remove phosphate rock therefrom *so long as*, and no longer, than they shall make true and faithful returns, and pay their rent (royalty), and this is sufficient. Under the decision of this Court this gives to the Coosaw Company the right to occupy and mine in this River, as long as they comply with the conditions. 272

The South Boulder Ditch Co. vs. Marfell et al., came up before the Supreme Court of Colorado, in 1890, 25th Pacific Reporter, page 204. The matter before the Court was the construction of an agreement, for the supply of water, by the plaintiff to the defendant, in which agreement it was provided : 273

"The company is to keep the ditch in good repair, and of sufficient dimension to carry the amount of water decreed it, and furnish to the said Joseph Mitchell the said 100 inches of water, year after year, for and during the irrigation season, for each and every year, SO LONG AS the said Joseph Mitchell shall pay the annual rental therefor."

The question before the Court was whether or not the terms of this agreement constituted a continual indefinite agreement in favor of the said Joseph Mitchell. The Court held that it did, and says : 274

"As above stated, the agreement runs for as many years as the consumer pays the sum named and uses the water. It terminates whenever he fails or refuses to make the specified payment. The instrument provides substantially for a series of annual contracts. In legal effect it extends, on behalf of appellants, an annual proposition, which, when accepted by its consumer, becomes a contract for the current season."

In the case of Near vs. Donelly, in the Supreme Court of Michigan, in 1890, 44 Northwestern Reporter, 1118, the question came up upon an agreement between the parties 275

as to the amount subscribed for the purpose of building a hotel, which agreement contained the following clause:

"And we further agree, that if on the completion of said building, the said Donelly will furnish the same in proper manner for the said hotel, he the said Donelly may have the rent and use of said building SO LONG AS he will keep the same as a hotel, by paying to each of us the interest upon the same, invested by us at 7 per cent.
276 per annum, to commence from the time it is paid in."

One of the questions before the Court was whether the subscribers had the right to require payment of the principal of their subscriptions—the agreement having been dated in 1869, and being therefore of many years standing. But the Court held that under the agreement they could not, saying:

"The face amount of the stock is not due, and Donelly cannot be forced to pay such subscription SO LONG AS he keeps the hotel as such."

These authorities sustain the point here. In each case
277 certain privileges were granted *so long as* the parties did certain things. In the first case, the man had the right to water on certain terms, SO LONG AS he paid his stipulated rent. In the second, the party was entitled to the use of other people's money, SO LONG AS he kept the hotel and paid interest at 7 per cent. In both, the Court held that this made an agreement continuing in favor of the party *so long as* he fulfilled the conditions.

In Arms vs. Burt, 18 Am. Dec., 682, the Supreme Court
278 of Vermont was considering a lease of land to A, B. "*so long as* wood grows and water runs." The Court held that the words implied one indefinitely continuing estate, and that the terms extended as fully beyond the use of the land as the term forever. The lease was therefore held a conveyance in fee.

In Bouvier's Institutes, Vol. 3, p. 276, the rule is stated that—

"If the estate is given while, or AS LONG AS a woman shall remain a widow, or until she shall marry, the estate being given to her only
279 during the time of her widowhood and no longer, it determines by her marriage."

The Statutes of South Carolina, in relation to land on Sullivan' Island, contain a somewhat similar provision. By Joint Resolution adopted 2nd Feb. 1791, citizens of the State were permitted to build on Sullivan's Island, (the property of the State), houses for summer occupancy, and it went on to provide :

"And the person or persons so building shall have the exclusive right to the same,...AS LONG AS he...may require for the purposes 280
aforesaid; *Provided*, The person or persons building as aforesaid, pay to the treasurer one penny annually, if required, for the use of the said land, delivering up the same when demanded by the Governor."

Here is a clear recognition of the force of the words "*as long as*" to create a right, or estate to continue, as long as certain conditions are fulfilled, or until certain demands are made.

And in order to provide for a means of terminating such construing grant, there was the express stipulation, deemed necessary, providing for the surrender, upon demand of the 281
Governor. No such limitation is contained in the Act of 1876.

To adopt the words of the Supreme Court of South Carolina, in Lesesne vs. Young, decided in 1890, 33 S. C., 543 :

"The Statutes should be construed according to the true intention of the law-maker and such intention must be ascertained if possible from the words used and in their ordinary way and proper sense. Where **the meaning of a word used is indicated by the terms of the act there is no necessity to look for extraneous circumstances** 282
in aid of construction."

The plaintiffs therefore claim under the principles laid down that the Act being in its terms plain and explicit, must be so construed, and that there is no necessity or right to go further in search of any other or further construction.

Communis Error.

But we insist further, that even if there were any doubt, still :

(1.) The acceptance of the Act of 1876 by the Coosaw 283
and other companies and their action thereunder whereby

their business has been regulated and their position altered in consequence by additional large investments and otherwise;

(2.) The claim and construction which the Coosaw and other companies have always made and maintained as to the Act of 1876, and which has always been known to the State and the public generally;

284 (3.) The acquiescence of the State in such claim and construction by doing nothing until the 21 years had expired or was about to expire in the face of Attorney General Conner's advice, to wit;

"It is scarcely prudent to leave the question an open one until then, and unless the State acquiesces in the doctrine, that a perpetual license is granted to all companies which comply with the Act of 1876, it will be for the Legislature to adopt such measures as, in its judgment, may be necessary for the protection of the rights and interests of the

285 State;" (Record, page 87.)

All justly require the construction claimed by the Coosaw Company. which even had it been in itself wrong has become right on the principle *communis error facit jus.*

Herndon vs. Moore, 18 S. C., 339 at 354-7.
Bomar vs. R. R. Co., 30 S. C., 455.
Peas vs. Peck, 18 Howard (U S) 579.
Schells, Exor., vs. Fauche, 135 U. S., 562.

See also McCrady's Opinions of July 2. 1884, pages 26 and 27.

286 It may be asked what the Legislature could have done? We reply, do what the statute books of South Carolina show to be a very common thing in such cases, pass a declaratory Act, an Act declaring what was the meaning of the Act of 1876.

287

6. THE ACT OF 1876 CONSTRUED WITH THE ACT OF 1870.

We submit under the principles quoted that the Act of 1876 being plain in its terms the Court is not at liberty to refer to the doctrine of in pari materia for the purpose of placing a different construction upon its terms.

We submit, however, further, that even construing the two Acts together, it will be seen that there was an evident intention on the part of the Legislature to make a new contract, to alter and change the terms of the Act of 1870, and therefore the terms of the Act of 1876, being the later Act, must prevail. 288

The only way in which the appellees seek to evade the terms of the Act of 1876, is by an effort to limit the plain meaning of this Act by the terms of the Act of 1870. They seek to do just what the Courts say must not be done, to wit: "To interpolate restrictions by importing them from another Act." 289

They claim that they must interpolate words so as to make the Act of 1876 read; "So long as and no longer than (during the remainder of the period of the Act of 1870) the defendants make true and lawful returns," &c.

They would thus by main force inject into the Act of 1876, a restriction *not placed there by the Legislature*, not necessary to the terms of the Act in question, but inconsistent with the plain meaning of its terms.

The Act of 1876 is not ambiguous or unintelligible and needs no reference to any other Act to understand it. 290

291

Let us compare the provisions of the two Acts and see how they read.

ACT OF 1870.

"Gives and grants to the following persons, to wit: George W. Williams (and others) and such other persons as they may associate with them, the right to **dig, mine and remove for the full term of 21 years, from the beds of the navigable streams and waters within the jurisdiction of the State of South Carolina,** the phosphate rock and phosphatic deposits. That this gift and grant is made upon the express condition that the said grantees shall pay to the State of South Carolina the sum of $1.00 per ton for every ton of phosphate rock or phosphatic deposits dug, mined and removed from the said navigable rivers and waters of the State, and further that said grantees should pay into the treasury of the State the sum of $500 as a license fee before commencing said work under said grant."

ACT OF 1876.

"Whereas, **it is desirable that the Coosaw Mining Company, and all other Companies,** or persons engaged in digging, mining and removing phosphate rock and phosphatic deposits as aforesaid, **shall accept the terms of this act in order to make it binding on them respectively,** and whereas the said Coosaw Mining Company **have already occupied so much of Coosaw River as lies opposite to and south of Chisolm's Island,** whereon their works are located, and to the marshes thereof, **and have expended large sums of money in establishing themselves thereon,** with sufficient plant for mining and preparing for market the phosphate rock and phosphatic deposit on that part of the said Coosaw River **therefore in consideration** thereof.

"SECTION 3. That the said Coosaw Mining Company **on accepting the terms of this Act** within ten days from the passage thereof, shall **thenceforth** have the **exclusive right to occupy, dig, mine and remove** phosphate rock and phosphatic deposits **from all that part of the said Coosaw River above mentioned,** SO LONG AS AND NO LONGER THAN they shall **make true and faithful returns** of the number of tons which they shall so dig, mine and remove and ship or otherwise send to market **and punctually pay the royalty thereon** as provided in the first section of this Act.

"SEC. 4. That **all other com-**

panies and persons engaged in digging, mining and removing phosphate rocks and phosphatic deposits as aforesaid, **under gift and grant of the State of South Carolina or by authority thereof,** who shall accept the terms of this Act within ten days from the passage thereof, **shall thenceforth have the same exclusive right** 296
where they have respectively occupied and established themselves for mining purposes, and **on the same limitations** as are prescribed in the preceding section of this Act."

Recollect that it is admitted by all parties that the Act of 1876 was intended to abrogate and alter the existing law. It was intended to offer to the Coosaw Mining Company and other persons engaged in mining in the State's territory a 297
new uniform contract, different in terms from the several ones then existing, and *which new contract*, as is evidenced by the terms of the Act, *Coosaw Mining Company, as well as others, was at liberty to accept or reject.*

Recollect that the Coosaw Mining Company claimed under the terms of the Act of 1870, and its agreement with the grantees named therein, the right to mine *in the whole of the Coosaw River.* That they claimed to be in actual occupation of this territory, and that, therefore, being there rightly, and 298
being in actual occupation, they had the right to mine it exclusively, as no two persons could rightly occupy the same territory at the same time.

It is true, that by the decision of the Circuit Judge of South Carolina in the Bradley case, the Act of 1870 was held, not to confer exclusive rights, but in that case no question of actual occupancy by the Marine Company was alleged or considered by the Court, and the Coosaw Mining Company not being a party to that case claimed exclusive 299
rights, notwithstanding this decision. Besides, the time for

appeal from this decision had not expired when the Act of 1876 was passed and the matter was not finally settled.

Now let us see what changes were made by the Act of 1876 in the prior law, as evidenced in the Act of 1870.

300 The Act of 1870 conveyed the "*right*" to dig, mine and remove. The Act of 1876 conferred the "*exclusive right.*" The *quality* of the right was therefore changed from a right not specifically made exclusive to one definitely exclusive.

Under the Act of 1870 the right given was "*to dig, mine and remove.*" Under the Act of 1876, the right given was "*to occupy and dig, mine and remove.*" The *character* of the right was, therefore, changed from a mere license to dig, mine and remove into an *estate* in the territory granted, as
301 evidenced by the word "*occupy,*" as to which we shall comment more fully later on.

The Act of 1870 conferred the right "*for the full term of 21 years.* The Act of 1876 conferred the right "*so long as and no longer than*" the parties should fulfill certain conditions specified in the Act.

The *duration* of the right was therefore altered, from a fixed term of 21 years to an indefinite term, dependent solely upon the fulfillment by the parties accepting the Act of its
302 terms and conditions, which might be less or might be more than 21 years.

Under the Act of 1870 the right was given to mine in the beds *of all the navigable streams and waters within the jurisdiction of the State.* Under the Act of 1876 the right conferred upon the Coosaw Company was limited to mining solely in *so much of the Coosaw River as lay opposite to and south of Chisolm's Island,*—and the right given to the other parties accepting the Act *was limited to such places* or territory as they had respec-
303 tively *occupied,* and in which they had established themselves for mining purposes.

The area of territory as specified in the Act of 1870 was therefore altered by the Act of 1876.

Under the Act of 1870 the gift and grant was *upon the express condition that the grantees should pay $1 per ton for every ton* of phsphate rock dug, and further, that they should pay the sum of $500 before commencing business under said grant. 304

Under the Act of 1876 the grant was to continue *so long as and no longer than* the parties accepting *should make true and faithful returns* of the number of tons dug, mined and removed or shipped, or otherwise sent to market, *and punctually pay the royalty* thereon, as provided in first section of the Act of 1876.

Examining the other sections of the two Acts, we find that the Act of 1870 required that the returns should be made annually, and oftener if required, by the State Auditor. The Act of 1876 provided that these returns should be made at the end of every quarter. 305

Under the Act of 1870 the royalty was to be paid *annually*. Under Act of 1876 the royalty was to be paid *at the end of every quarter, or every three months*, the first quarter to commence on the first of March, 1876.

Under the Act of 1870, royalty on every ton "*dug, mined or removed* from the beds of the navigable streams and waters of the State during the year preceding." 306

Under the Act of 1876, the royalty was to be paid on every ton "*dug, mined, removed and shipped*, or otherwise sent to market," at the end of every quarter.

We thus see, that the Act of 1876 made numerous, material and sweeping changes in the law, as evidenced by the Act of 1870 and all prior Acts relating to mining in the said State's territory.

In fact, the *only material provision not changed by the Act of 1876*, was in the amount of royalty to be 307

paid, which remained unaltered at $1 per ton, as it had been fixed by all other Acts equally with that of 1870. The language of the Act of 1876 is "the royalty *already provided by law*," not the royalty prescribed by the Act of 1870, or any other special Act. From the very beginning up to the Act of 1890 the general law and rule was $1 per ton royalty. It was, therefore, eminently proper that the Legislature should, as
308 it did, insert a section providing that all Acts inconsistent with that Act were thereby repealed

Now, it is admitted by the State, by Gen. Conner in his opinion, by the counsel for the appellees before this Court, and by every one, that the Act of 1876 was broad enough to change the conditions of the Act of 1870 from a general to an exclusive right; to change the rights of the parties from a general privilege of digging in any and all of the navigable streams of the State to a right to dig only in a certain limited territory; to change the tenure of the grant from a
309 simple license to dig and mine to an *estate* in property, to *occupy*, which they were given exclusive right,—and yet it is claimed that the Act is not broad enough to change the duration of the right from a fixed tenure to an indefinite one.

In other words, while it is admitted that the Act of 1876 changed the right and the tenure and the terms and conditions of the Act of 1870 in almost every particular, they claim to interpolate in the Act of 1876 that which entirely nullifies the provisions of the Act of 1876, as to the one change only which alters the tenure of the parties mining
310 thereunder to a term dependent only upon their faithful compliance with the conditions of the Act.

It is urged however, that whereas the Act of 1870 gave the right upon the express condition that the grantees should pay the sum of $1.00 for every ton mined, without specification of the periods at which it was to be paid, that this is the equivalent of the provision of the Act of 1876 that the parties accepting should have the right to mine, "*so long as and no longer than they should make true and faithful returns of the number of tons they should so dig, mine remove and ship,*
311 *or otherwise send to market, and punctually pay the royalty thereon, as provided in the first section of this Act*"; which first

section provides definitely and with particularity for the time and manner of making the returns and paying the royalty.

But if the legislature of South Carolina intended in the Act of 1876 to simply continue the same conditions as expressed in the Act of 1870, or merely to enlarge such conditions, *why did they use words entirely different*, and, in their original acceptation, conveying so entirely a distinct and different meaning? 312

If the legislature intended the same thing as was provided in the Act of 1870, *the necessary presumption is that they would have used they same words.*

But when the legislature, with the Act of 1870 before it and present to its mind, saw fit to use and adopt words entirely distinct and different, has the Court the right to say that the legislature did not know what it was doing? That by the careful use of different words it did not mean a different thing? 313

But cannot a Legislature with the eonsent of the grantee change or delay at pleasure the terms of any existing grant.

Suppose a company had been chartered in 1870 for 50 years or perhaps perpetually—and in 1871 the State granted to it the right to mine for 21 years, and afterwards in 1876 made a contract with it (repealing the former grant) to occupy and mine so long as and no longer than it should comply with conditions of the contract. Would the duration of this contract be determined by the granting Act of 1871? Would it 314 not rather be determined by the Act of Incorporation of 1870?

When we see that the legislature by the Act of 1876 changed the character of the grant, the tenure of the grant, the conditions of the grant, the location of the grantees, and by words fit and apposite also changed the duration of the grant; we are told that whilst we must accept all these changes, we must draw the line at the matter of duration, and assume that the legislature did not know or mean what it said, and that this Act must be restricted by the duration or 315 period fixed in the Act of 1870.

Why not as well limit the provisions of the Act of 1876 in the other respects, as limit them in this? The words "*Exclusive rights*," are no clearer to express that idea, than the words "*so long as and no longer than*" are clear and distinct to convey the idea of a continuing indefinite tenure.

That every word used by the legislature is presumed to
316 have been inserted for a purpose, is so well applied by this Court in Platt vs. Union Pacific R. R. 99 U. S. 58. that we ask leave to quote it here.

There the Government had made a grant of lands to the Railroad with power "to sell or dispose of" the same, and all lands not "sold or disposed of" within three years, were to be open to pre-emption and entry. The Railroad did not sell the lands within three years, but put a mortgage on them, and it was claimed that this was not a sale or disposition within the terms of the Act, and that the lands were open to
317 pre-emption.

But the Court says:—

"What did Congress mean in the Act of 1862? That **something else than sale, either total or partial, was intended we are required by all the rules of construction to conclude. Congress is not to be presumed to have used words for no purpose.** If it was intended that only lands which had been sold before three years had expired after the entire completion of the Railroad should be exempted from pre-emption, the words "or disposed of," **were entirely superfluous.**

"But the admitted rules of statutory construction declare **that a**
318 **legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a Statute.**

"In **Commonwealth vs. Alger** (7 Cush. (Mass.) 53-89), it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if practicable, as to give some effect to every part of it. So, in **People vs. Burns** (5 Mich. 114) it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect in **Dearborn and Others vs. Inhabitants of Brookline** (97 Mass. 466); and in **Gates vs. Salmon** (35 Cal., 576) it was ruled that no words are to be treated as surplusage **or as repetition.** The phrase
319 "or disposed of," must, therefore, have some distinctive meaning, some meaning beyond the word "sold."

In this connection we also call special attention to the use of the word "*occupy*" in the Act of 1876.

In the Act of 1870, and in all prior Acts passed up to that time on the subject of phosphate mining the right had always been "*to dig, mine and remove*" and these words are the words found in the later legislation on the subject. But when the Act of 1876 was enacted, the Legislature saw fit to change the phraseology, and the right there given is "*to occupy and dig, mine and remove.*" The Legislature used a new and additional word to those which were used before. 320

It is an axiom of construction, that every word in a statute is to be given its full meaning. The Legislature is presumed to know the use of words, and when it uses a word having a technical meaning, is presumed to use it in full knowledge of its scope and effect.

It is an equally well recognized axiom that when the Legislature, in a later Act, *interpolates additional words to those used in a prior Act*, that it must be presumed to have meant an additional thing. The use of additional words carry with it an absolute implication of the intention to make additional legislation. 321

We submit that by changing the "right to dig, mine and remove," to a "right to *occupy*, and dig, mine and remove" the Legislature granted to the Coosaw Mining Company and other persons accepting the Act what was, in effect, an estate upon conditions.

It was no longer a mere license to dig for valuable consideration, but it was a creation of an absolute estate. 322

The word *occupy* implies tenure of land. It is equivalent to possession.

In its primary and familiar sense, the word occupy is equivalent to the word possess. It implies a conception of permanent tenure, for a period of greater or less duration.

See Lawson's concordance, page 240.

In King vs. The Inhabitants of Eatington, 4th Durnford & East, 177 and 181 to 182: 323

Proviso "that A. shall live in and *occupy* the said cottage."

Lord Kenyon, C. J.:

"If this question had depended on the first words in the proviso, I should have thought that they would have been satisfied by determining that only a liberty to inhabit the cottage was reserved to the father; **but the word "occupy" carries the interest reserved still further, and shows that the whole estate was intended to be reserved to him.**"

"**The word occupy, in the proviso, is extremely material to show**
324 **that the deed must have this operation**; for it is a reservation of the thing itself, of the whole estate. For a license to occupy an estate for a particular time is a lease of the whole estate for that time.

The material question is, whether, by the terms of the proviso, the father is to be considered as having reserved merely the liberty to live in the cottage, or an estate for life? and there is no doubt but that the latter was intended. Something more was meant than a bare license to inhabit or live in the house, **for the word "occupy, is added to them.**"

In Dallas City vs Missionary Society, 6 Fed. Rep., 370, the Court was construing the section of the Revised Sta-
325 tutes of the United States, granting to Mission Stations land "*occupied*" by them. And the Court says:

"To occupy is to possess, not **constructively** but **actually**. The word is of more limited signification than possession. It is derived from **ob** and **capio to lay hold of**, and means to possess by having hold of or being actually upon the thing possessed, continuously and exclusively."

Lacy vs. Green, 84 Pa. St., 520, was the case of a mining lease or license where the right of "occupying" a pond was given.

326 And the Court says:

"In the concluding clause of the reservation, the word "occupying" is believed to express the governing idea in the minds of the parties, and to furnish the key by which their intention should be interpreted. The pond and shore were to be **occupied** for the purpose of securing and holding lumber and timber taken from the Foord and Lacy property.' **In the primary and most familiar sense of the word "occupy," it is the equivalent of the word "possess."** It implies the conception of permanent tenure for a period of greater or less duration."

In Abbott vs. Upham, 13 Metc., 174, a mortgagee who
327 enters and takes possession, requiring tenants to attorn to him, and who holds possession through such tenants is in "occupation" under a Statute requiring "occupation."

In Herksell vs. Bushnell, 37 Conn., 37, "owned" or "occupied," were held to be convertible terms, the meaning being that the premises must be in the actual or constructive occupation of the person.

See, also, Locke vs. Rowell, 47 N. H., 46.
Wolfskill vs. Malagon, 39 Cal, 276
Stockwell vs. Brewer, 59 Me., 289.
McConaughy vs. Baxter, 55 Ala., 381. 328
Gough vs. Everard, 2 H. & Coll., 11.

Lawrence vs. Fulton, 19 Cal. 684, in which latter case, the words "occupation," "*possesio pedis*" "subjection to the will and control," are employed as synonomous terms, and as signifying actual possession.

See also Walten vs. People, 18 Ill., 194, and the full notes on this subject annexed to the case as reported, 65 Am. Dec., 734-35,

329

When therefore the Legislature inserted in the Act of 1876 this additional word "*occupy*," it is conclusive evidence that it intended to largely amplify the then rights of parties affected by the Act, and that it must be construed as largely extending and amplifying such rights.

We have gone through with this legal examination for two reasons:

First, to show to how great an extent the legis- 330
lature went under the Act of 1876 in altering, and changing the rights existing under the Act of 1870 and under all other prior Acts.

For when we see that the Legislature in this Act, make such important changes and confers so much greater rights in this direction, than existed under any prior Act, have we a right to say or assume, that they did not intend, what was certainly no greater change, to alter the duration from a fixed period of 21 years to a continuing right upon condi- 331
tions, which might be less and might be more?

And next we have gone into this discussion here to bring to the attention of the Court, what is the estate and right held by the Coosaw Company under the Act of 1876, in and to the territory described therein. We shall consider this more fully later on.

We therefore submit that in as much as it is admitted the Act of 1876 changed the Act of 1870 in many serious par-
352 ticulars, we have no right to assume that the Legislature did not intend what the meaning of the words would imply as to the duration of the rights.

We submit another consideration. Our friends on the other side treat the Act of 1876 as an *amendment* to that of 1870. But if it was intended simply for the purpose of amending that Act, would it not have been so styled and so worded?

The fact that it does not refer to the Act of 1870 or to any particular previous Act, proves conclusively what we
333 claim: that the Legislature intended to make a new rule to establish an entirely new and uniform system. It was as we have said, a novation of all existing contracts, and when accepted, stood and spoke for itself.

We submit one further consideration to the Court. Under the Act of 1876, as the Coosaw Company contend, their right to occupy and dig, mine and remove, is to continue "*so long as and no longer than*," they make the returns and pay the royalty as provided in the Act.

A failure in either of these particulars at any time, works
334 an absolute forfeiture of the grant and of all the rights and privileges enjoyed by the Coosaw Mining Company thereunder.

Our friends on the other side however, insist that this forfeiture *relates only to the exclusive right* granted by the Act of 1876, and that a failure to comply with its conditions, remits the Coosaw Company to the position it occupied before the Act of 1876 was passed. In other words that the price which the Coosaw Mining Company paid for the con-
335 version of its general right to an exclusive one, was the insertion of a clause forfeiting such exclusive right if the con-

ditions therein were not fulfilled; that the Coosaw Company having a general right, retained that right, but so long as it fulfilled certain conditions, that right should be recognized as exclusive, and the failure to fulfill those conditions remitted them to their former position.

We submit on the other hand as we have already said that the Act of 1876 was a novation of a contract; that the Coosaw Mining Company by accepting its terms surrendered any and all rights which they otherwise had, and that they held their rights only as specified in the Act of 1876, and only under that Act, and only "so long as and no longer than" they complied with these conditions. 336

That this was the understanding on the part of the State is clearly proven by its subsequent action.

We have seen that, under the agreement between the Coosaw Mining Company and the grantees under the Act of 1870, the Coosaw Mining Company was to have the right to mine from the bed of the entire Coosaw River. (Record page 22.) This was the right which they had and claimed under the Act of 1870, and if the contention of our friends on the other side is correct, then, failing to comply with the terms of the Act of 1876, they were remitted to their right to mine in the whole of said River under the provisions of the Act of 1870. 337

But under the Act of 1876 the Coosaw Mining Company was limited to only so much of the Coosaw River as lay opposite to Chisolm's Island, and in accepting the terms of said Act, they accepted this limited area and waived their right to the balance of the River. 338

This waiver was accepted by the State, and by Section 12 of the Act approved March 22d, 1878, (16 Statute S. C., page 658) the State granted to the Farmer's Phosphate Company

"The exclusive right to dig, mine and remove phosphate rocks **from the bed of the Coosaw River** excepting all that part of Coosaw River which lies opposite to Chisolm's Island and which was occupied by the Coosaw Mining Company, and which was exclusively granted to the Coosaw Mining Company under the Act of 1876." 339

This Act is printed in full in an Appendix to this Argument.

The State therefore by accepting the surrender of valuable rights from the Coosaw Company, and the bestowal of those rights exclusively on other parties, who entered into the enjoyment of them, precluded the Coosaw Mining Company from being remitted to the position which it occupied under
340 the Act of 1870.

It will not do therefore now for those representing the State to claim that, under the Act of 1876, the forfeiture provided worked only the loss of the exclusive right therein given, and remitted the Coosaw Company to its former position, when the State, by its own Act, has rendered that impossible, because it has accepted the territory surrendered and given it exclusively to others.

If therefore the words "*no longer than*" mean an absolute forfeiture of all rights on failure to comply, "*so long as*"
341 must mean a right to continue until such forfeiture has been incurred.

7. ACT OF 1876 A PUBLIC ACT.

"*We submit however, further, that the Act of 1876 cannot be limited and controlled by the Act of 1870, because the Act of*
342 *1870 was a private Act limited only to the grantees therein named and their associates, whereas the Act of 1876 was a public Act referring not only to the Coosaw Mining Company, but to all persons mining in the territory of the State, who chose to accept the terms of said Act, and comply with its conditions.*

We submit further that it would not be proper to resort to the language of any other private Act, not relating to the same persons, to limit the general terms of the Act of 1876.

343 This rule is well stated by Endlich on interpretation of Statutes, Sec. 55, as follows:—

"Nor in the exposition of private Statutes, conferring special privileges, or imposing particular obligations, would it be proper to resort to the language of any other private Act, not relating to the same parties and subject matter, such Statutes standing on the same basis with contracts by deed, not generally affected by evidence aliunde. Private Acts of the Legislature conferring distinct rights on different individuals, which never can be considered as being one Statute, or the parts of a general system, are not to be interpreted by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between 344
different persons."

For, the case at bar is not a case of two *private* or *special* Acts, or two *public* or *general* Acts, but a *private* or *special* Act (the Act of 1870) and a later *public* or *general* Act (the Act of 1876.) What Court has ever construed a *public* or *general* Act, and a prior *private* or *special* Act *in pari materia*? There may be some reason for construing a private or special Act and a prior public or general Act *in pari materia*—but not a *public* or *general* Act and a prior private or special Act.

That the Act of 1876 was a public Act, not relating ex- 345
clusively to parties mining under the provisions of the Act of 1870, but applying to all persons engaged in mining, is not only clearly seen by its terms, but also by a consideration of the pleadings before the Court, and of the further legislation of the State.

It is to be noticed that the complainants themselves, in their Bill, admit that this is *an Act of the General Assembly* of the State of South Carolina. That it was duly approved the 28th of March, 1876. It is therefore a legislative Act, 346
duly passed under the proper constitutional requirements, and duly and properly approved.

It is also a general and public Act.

This is undoubtedly so under the tests as set out in Unity vs. Burroughs, 103 U. S., 454.

This is further proved under the rules laid down in the case just cited, by a simple inspection of the Act itself which deals generally with a public subject, and relates not only to the Coosaw Company but to all persons who might 347
be mining in the phosphate territory of the State.

As this Court takes judicial notice of the public Acts of the State, it is also proper in this connection to bring to the attention of the Court an Act of the State of South Carolina, entitled:

"An Act to protect the rights and interests of the State, in the phosphate rock and phosphatic deposits in the navigable streams and waters of the State, approved March 22d, 1878."

348 16 Statutes at Large, page 658.

This Act is printed at length in an Appendix to this Argument.

Between the enacting of these two Acts, there had been a change in the Administration, and under the direction of the Legislature of South Carolina, the Attorney-General, General Conner, had made his elaborate report to the Legislature on the subject of their phosphate interests, to which reference has been made. This report dealt largely with the Act of 1876, and the rights of parties accruing under
349 it. (Record, p. 78.)

In this report General Conner called the attention of the Legislature to the claim that would probably be made by the parties who had accepted the terms of that Act, to a perpetual and continuing exclusive privilege to mine in the several territories which they had respectively occupied. He at the same time, intimated his doubt whether that claim could be successfully maintained, but brought it to the attention of the Legislature as one proper for legislative action. He also advised the State to adopt the system of ~~General~~ Preferred Rights.
350 (Record, p. 87.)

The Act of 1878 was passed after his report, and in consequence of its general recommendations on the subject of the phosphate industry of the State.

This Act repealed all charters theretofore granted for the purpose of mining phosphate rock, which were liable to amendment, modification or repeal by the law of the State, *thereby recognizing that there were persons mining, whose grants and rights were not subject to such amendment, modification or repeal.*

351 In Section 2 a large number of companies are incorported, for the purpose of engaging in the mining of phosphate rock.

In Section 6 each of the said companies, when organized, is required to make returns to the Comptroller-General of the phosphate rock mined, and to pay to the State Treasurer the royalty thereon, and execute a bond in the sum of fifty thousand dollars.

"Conditioned for the payment of the said royalty **in accordance with the Act of the General Assembly, entitled 'An Act, &c., approved 28th March, 1876,** which bond and the sureties thereon shall be subject to the approval now required by law for the bonds of State officers, and the company upon so doing shall thereupon become and be **subject to all the provisions of the said Act, approved March 28th, 1876.'**" 352

The Legislature thereby recognizing not only the legal existence of the Act of 1876, but that there were persons mining under its provisions and claiming title thereunder, and paying royalty in accordance with its terms, and also that it was a general public Act

353

The Legislature therefore recognizes the Act of 1876 as a general and constitutional Act, properly and duly passed, and forming a part of the general and legal law of the State, and as one containing provisions bearing generally upon all parties mining in the State's territory.

In Section 12 the Farmers' Phosphate Company is organized and given

"An exclusive right to dig, mine and remove Phosphate rocks from the bed of Coosaw River, excepting all that part of Coosaw River which lies opposite to and South of Chisolm's Island, whereon the works of the Coosaw Mining Company are located, and the marshes thereof, which was occupied by the said Coosaw Mining Company, and which was exclusively granted to the Coosaw Mining Company by Act of the General Assembly, No. 199, approved March 28th, 1876." 354

The Legislature, therefore, with General Connor's report before them, and with their attention called to the matter, carefully recognized the Act of 1876 as a legal Act, and as exclusively granting to the defendants the Coosaw territory, and says nothing about limiting the claim to perpetual tenure, which it knew the defendants asserted. 355

In Section 15 the Marine and River Mining Company upon its surrendering the general right claimed by it under the Act of 1870, and upon paying a certain sum of money, and upon its acceptance of the provisions of the said Act of 1876, was authorized to consolidate its shares and to enforce, the payment thereof.

The Legislature again recognizes the Act of 1876 as be-
356 ing a legal Act, with full force of law, and as containing provisions generally applicable to parties mining in the Rivers of the State.

Section 27 provides that

"Any and every Company digging and mining UNDER THE PROVISIONS OF THE ACT APPROVED 28TH MARCH, 1876, and of this Act, shall be considered and regarded as having punctually paid the royalty as therein provided, if the same be actually paid to the State Treasurer within ten days of any quarter when the same became due."

357 We therefore submit to the Court that the action of the Legislature in thus recognizing and re-enacting the Act of 1876, in and by the Act of March, 1878, was equivalent to a re-enactment of the Act of 1876.

In the case of Anderson vs. Santa Anna, 116 U. S., 365, the Supreme Court says:

"We have already seen that St. Joseph vs. Rogers, supra, maintained the validity of the very Act before us now, upon the authority as well of the then existing law of the State, as declared by its highest Court, as of our own decisions upon the general question of the power of the
358 Legislature to legalize that which it might have originally authorized."

In Grenada County vs. Blogden, 112 U. S., page 271, the Court says:

"Since what was done in this case by the constitutional majority of qualified electors, and by the Board of Supervisors of the County, would have been legal and binding on the county had it been done under legislative authority previously conferred, it is not perceived why subsequent legislative ratification is not, in the absence of constitutional restrictions upon such legislation, equivalent to original authority."

359 We find, therefore, that the Act of 1876 is not only a public Act, rightfully approved, but that it is recognized

and confirmed by a subsequent Legislature, after the rigid scrutiny of its Attorney-General, and when the Legislature, under a different Administration, was making new regulations on the entire subject.

Now remember who were "the other Companies and persons engaged in digging, mining and removing phosphate rock in the navagable streams of the State," referred to 360
in this Act, and who were invited to accept its terms and provisions, and become entitled to its benefits and privileges?

First. There was the Marine and River Phosphate Mining and Manufacturing Company of South Carolina. This was the corporation formed by the grantees under the Act of 1870, after their agreement with the Coosaw Company, and of course mining under the rights contained in the Act of 1870.

361

Next, there was the South Carolina Phosphate Company, Limited, otherwise known as the Oak Point Mines. This was an English Corporation. mining in North and South Wimbee Creeks, under an agreement with the grantees under the Act of 1870, similar to that made by them with the Coosaw Mining Company.

Next, there was the South Carolina Phosphate and Phosphatic River Mining Co. This was a Company chartered by an independent Act of the Legislature of South Carolina, approved March 9th, 1871, 14 Stat., page 688. They 362
obtained their rights directly under this Act and had no connection whatever with the Act of 1870.

Next, there was the Boatman's Company which was also a direct Corporation, incorporated under an Act approved January 29th, 1874, 15 Stat., page 531. Its rights were derived entirely from its own Act of incorporation, and did not depend at all on the Act of 1870. Nor had it any connection with that Act.

Next, there was the Ladies Island and Coosaw Mining 363
Company, approved March 3d, 1876, 16 Stat., page 95,

which also had no connection whatever with the Act of 1870.

We see, therefore, that one-half of the companies then holding mining rights in the State's waters had no connection whatever with the private Act of 1870, but derived their privileges from and were subject to conditions
364 contained in Acts entirely separate and distinct.

Now if the contention of our friends is right, and the Act of 1876 is to be construed *in pari materia* with the Act of 1870, and clauses from the Act of 1870 are to be interpolated into the Act of 1876, are we not so far as these other companies are concerned, violating a fundamental rule of consideration?

What authority have we to limit the rights of other parties referred to in the Act of 1876, and to whom its terms were held out for acceptance, by the terms of a private grant with which they had no connection whatever, and which did
365 not affect them in the least?

But our friends contend that each of these companies under the Act of 1876 must be considered *in pari materia* with their separate Acts of incorporation. This would bring us then to this condition of things, that in construing a public Act of the State, making changes in a matter of public importance and establishing uniform rules and systems, we are to give it a half a dozen different constructions according as we apply it to different persons or companies named in such Act claim-
366 ing the benefit of these provisions.

The Court is called on to construe one homogenous public Act and sundry heterogenous private Acts together in pari materia.

This is preposterous. The Act of 1876 being a public Act must have a uniform construction, applicable alike to all persons affected by it.

367 But our friends raise the objection that to do this would be to give a period of perpetual life to corporations whose existence was limited by their charters.

We submit that this does not answer the position; that whether the Boatman's Company was chartered for 30 or 40 years cannot affect the construction of the Act of 1876. If the Boatman Company as a grantee thereunder should cease to have corporate existence it would *ex necessitate* lose any further rights. For being unable to make returns as a corporation and pay its royalty as such, its right under the Act of 1876 would forthwith cease and determine. 368

The grant to persons or to corporations to enjoy a right conditionally and indefinitely, of course carries with it the idea of enjoyment, only during the continuance of life or corporate existence, unless specially provided to go to successors or assigns.

If the legislature at the time of the expiration of the several charters of these companies, determined to renew the same, it was a matter entirely within the scope of the power of the legislature. 369

If the legislature knowing such corporations to be in the enjoyment of these rights chose to renew their corporate existence, it was within their power to do so and no one has a right to complain.

But our friends, urge, that to construe the Act of 1876 according to its plain meaning, to wit: that the right thereby granted would continue *indefinitely, so long as and no longer than* the Coosaw Company, or any other person accepting fulfills the conditions of the Act, creates a grant in perpetuity. 370

We differ entirely in this position. No grant of a mine can be a grant in perpetuity, because the thing granted is in its very nature limited. A grant in fee simple may be made of land which conveys the title to the grantee and his assignee for all time; but in all mines there is only so much of a deposit and no more, and when this is exhausted, the mine ends.

A continuing grant, therefore, to mine in the Coosaw River means, and can only mean, a right to exhaust the deposit there, and, when that is done, all right and claim of the company in and to that territory, ceases. 371

It is urged, however, again, that to give this continuing construction to the Act would be to confer perpetual life on the Coosaw Company. That this being not a corporation, but a mining partnership, has continuing life, and that, therefore a grant to them would be violating the principles of the law which abhors perpetuity.

372 In answer to this, we beg to call attention to the articles of the association of the Coosaw Mining Company, printed in the report and to be found in the Record at pages 54 to 55.

It will be seen that the life of the Company is strictly limited to *forty-three* years, so that the continuing grant continues simply for that period and no longer.

If we come then to a question of dates in the construction of the Act of 1876, it simply resolves itself into a question whether the grant continues for 21 years under the Act of
373 1870, or so long as and no longer than the Coosaw Company should comply with the conditions of the Act during a period of forty three years from the date of its organization, because it will then cease to exist.

We may say that mining partnership or joint stock companies are recognized by the laws of South Carolina and provisions made by its Statutes for recording the articles of association. (Record page 2.)

374 But aside from and in addition to this, the fact that one construction of an Act gives an exclusive right to a corporation, even in perpetuity, is not sufficient to prevent its adoption by the Court.

In the Binghampton Bridge, 3 Wall, 52, 81, a case involving such results was before this Court, and a construction against the perpetual exclusive right was urged upon it. But the Court construed it to be "a perpetual charter," giving a monopoly to the corporation,—an exclusive right to maintain its bridge in the locality occupied by it.

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8. Can the Supposed Policy of the State be Considered in Construing this Statute?

We submit, that it cannot; that what is termed the policy of the Government with reference to any supposed legislation is too uncertain to be used in construing statutes. 376

But we submit, further, that even if we find that the Act of 1876 differs from other Acts in the duration of the grant, the inference is only the stronger that it was intended to be different.

Furthermore, we maintain that the policy of the State in 1876, no matter what it was before or afterwards, was to make a uniform system of continuing grants so long and no longer than the State's conditions were complied with.

377 It is urged by our opponents that in all Acts granting mining privileges, except the Act 1876, the duration of the grant was always limited. Thus, in the Act of 1870 it was 21 years; in those between 1870 and 1876 it was from 30 to 40 years, and in the Act of 1878 it was 10 years.

That this showed a settled policy on the part of the State to grant such privileges only for a definite fixed period—to limit the duration of the right to mine, a policy which it cannot be properly held the State intended to depart from by the Act of 1876. And therefore this Act must be construed and 378 limited by such supposed policy, to confer a fixed and not an indefinite right.

The same view was urged on this Court, in the case of Hadden vs. The Collector, 5 Wall., p. 111 in which it was sought to limit the scope of an Act by the supposed "policy," of the Government.

But the Court says:

"The supposed policy of the Government is stated to be the encouragement of manufactures by imposing restriction on goods 379 manufactured in whole or in part abroad, and hence it is argued

that it was against such policy to impose duties on the raw material.

"Little weight can be given to considerations of this character in the construction of the Act.

"What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes."

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But the so-called policy of the State was gradual. She started with 21 years, then 25, then 30, and then culminated in the indefinite term of the Act of 1876. Then she changed her policy and went down to 10 years. It might as well be said, arguing from policy, that every term was reduced to a ten year limit by the Act of 1878, which must be construed *in pari materia* with the other Acts!

This is conclusive on the first point. If we are to construe statutes, not by their words, but by what we suppose is the
381 policy of the Government derived from other statutes, we shall soon be hopelessly at sea.

Endlich on Statutes, Secs. 5–6–7.

But suppose we assume the policy of the State as established to be, as a general rule, to limit the duration of these privileges; and we find that the Act of 1876, by its express terms, does not so limit the privilege granted. What then?

Are we to say, that because in other Acts the Legislature
382 fixed a limited duration that therefore the Legislature should have limited the duration also in this? And that, because it has not done so by the words used, we are to assume that that was an oversight, and supply the omission by a forced construction? Then the Court should resolve itself into the Legislature.

On the contrary, when we find that in every other Act the Legislature distinctly provided that the right should exist for a prescribed number of years, while in this it enacted that it should continue "*so long as and no longer than*" certain con-
383 ditions were fulfilled, is not the conclusion irresistible that the Legislature intended that there should be a differences.

Does it not prove conclusively, that when the Legislature desired to limit the duration it knew how to do it, and did it? But that it also knew what it was about when it intended to grant a right conditioned on the performance of certain duties, and continuing as long as they were performed and it did it?

We might just as well say that because no other Phosphate Act or grant gave the right to "*occupy*," thereby putting the grantees in possession, that therefore the policy of the State against allowing such possession is proved, and we must ignore entirely the consideration of this important and significant word, and hold that the Legislature meant nothing when they inserted it in the Act of 1876. 384

Certainly if words mean anything, and we find that the Legislature carefully omits the terms used in other Acts, and substitutes words with an entirely different meaning in this, we are bound to recognize that it was done purposely and give effect, and full effect to such words. 385

9. IS THE CONTRACT UNDER THE ACT OF 1876 VOID FOR WANT OF MUTUALITY?

We submit that the contract under the Act of 1876, is not unilateral, but even if it is, that the rule is that where one party has received the consideration for which he bargained, he is bound even if the contract be unilateral. 386

It is urged that every contract to be binding must be mutual. That the Act of 1876 while it binds the State to allow the Coosaw Co., to mine indefinitely, does not bind the Company to mine at all. That therefore there is no mutuality and the contract is *mudum pactum*.

But even assuming this to be so, which we do not, the complete answer is that the State, as we have shown received ample consideration for the contract. And having accepted this consideration, she is bound to comply with 387

her contract whether it allows an "option" to the Coosaw Company or not.

In Storm vs. United States, 94 U. S., 83, the Court says:

"Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants, on the same, to say that the agreement
388 did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have in fact been performed in good faith, and without prejudice to the defendant. Addison on Contracts (6th Edition) 15; Morton vs. Burr, 7 Ad. and Ell., 25.

"Agreements are frequently made which are not in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties. Contracts of guaranty may fall under that class as when a person solicits another to employ a particular individual as his agent for a specified period, and engages that if the person addressed will do so, he, the applicant, will be responsible for the moneys the agent shall receive and neglect to pay over at that time. The party indemnified
389 in such a case **is not bound to employ** the party designated by the guarantor; **but if he do employ him** in pursuance of the promise, the guaranty attaches and becomes binding on the party who gave it. Kennaway vs. Treleavan, 5 Mees & W. 501.

So in Richardson vs. Hardwick, 106 U. S., 254, the Court construing an unilateral contract says,

"The written contract gives him the privilege, or as counsel call it, an "option" to become equally interested in the lands by paying one half purchase money, &c., within two years after its date.

"**In suits upon unilateral contracts, it is only where the defend-**
390 **ant has had the benefit of the consideration for which he bargained that he could be held bound.** Jones vs. Robinson, 17 L J. Exch, 36; Mills vs. Blackall, 11 Q. B., 358; Morton vs. Burn, 7 Ad. and E. 19: Kennaway vs. Treleavan, 5 Mee and W., 498."

In Kennaway vs. Trelevan, 5 Mee and W., 501, the Court construing an unilateral contract says:

"It is said and truly, that in the present case there was no binding contract on the plaintiffs, and that, notwithstanding the guarantee, they were not bound to employ Paddon. But a great number of the
391 cases are of contracts **not binding on both sides at the time when made, and in which the whole duty to be performed rests with one**

of the contracting parties. A guarantee falls under that class; when a person says: In case you choose to employ this man as your agent for a week I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you, **the party indemnified is not therefore bound to employ the person designated by the guarantee;** but if he do employ him then the guarantee attaches and becomes binding on the party who gave it. It is therefore no objection in the present case to say that the plaintiffs were not obliged to take Paddon into their service, they might do so or not, as they pleased; but having once done so, the guarantee attaches and the defendant be- 392
comes responsible for the default."

In Mills vs. Blackall, 11 A, & E., 366, the Court says:

"Mr. Oyles' objection, that there is no mutual liability, would be of great weight if **the action were brought for non-performance of an executory agreement.** But here the agreement has been performed on one side."

The law of "options" is also now well settled.

An agreement optional as to one party, and obligatory as 393
to the other, is a mutual contract.

Cherry vs. Smith Notes, 39 Am. Dec., 150.
1 Parson's Contracts, 448–451.

Especially is this the case where the promise was accepted. It is then binding. It is an accepted option.

Options on considerations are always good. So also, a promise for a promise,

And especially is this the case when the agreements go 394
only to part of the consideration, and the considerations are part promise, part money, part other inducements.

2 Parsons, p. 676.

An agreement may be optional as to one party and obligatory as to the other, but if based on consideration is binding and may be enforced.

The party making the promise is bound to nothing until the promisee within a reasonable time, engages to do, or else does, or begins to do, the thing which is the condition of the 395
first promise. Until such engagement or such doing, the

promisor may withdraw his promise, because there is no mutuality, and therefore, no consideration. But after an engagement on the part of the promisee which is sufficient to bind him, the promisor is bound also. The thing done, is itself a sufficient and complete consideration.

It is not necessary that consideration should exist at the time of making the contract. Until the performance of the
396 condition by the promisee, the promise is *nudum pactum*. After performance it is clothed with a valid consideration, which relates back to the promise and then it becomes obligatory.

But we do not admit that this contract was unilateral. One consideration alone, and that in itself sufficient, was that the Coosaw Co. having located themselves with sufficient plant to mine a certain territory, were to maintain it. If they ceased to keep up such a plant, and to continue their mining
397 operations on a sufficient scale, the consideration failed and the grant became forfeited.

As this Court has well said in Louisville Gas Co. vs. Citizens Gas Co., 115 U. S., 693:

"Permission to keep a tavern or a ferry or to erect a toll bridge over a stream which is crossed by a public highway, to build a mill-dam across a navigable stream, and the like are special privileges, and being matters in which the public have an interest, may be granted by the legislature to individuals or corporations; **but the**
398 **grantee upon accepting the grant at once becomes bound to render that service, to secure which the grant was made; and such obligation, on the part of the grantee is just as necessary to the validity of a legislative grant of an exclusive privilege, as a consideration, either good or valuable, is to the validity of an ordinary contract.**

Whenever, by accepting such privilege, the grantee becomes bound, by an express **or implied undertaking**, to render service to the public such **undertaking will uphold the grant, no matter how inadequate it may be**; for, the legislature being vested with power to make grants of that character, when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant, and the amount of service to be rendered in consideration therefor, and the Courts have no power to interfere, how-
399 ever inadequate the consideration, or unreasonable the grant may appear to them to be."

The Coosaw Co. accepted the terms of the Act of 1876 and thereby became bound to fulfill the conditions. It has fulfilled them up to this time and furnished the consideration which upholds the grant.

In Bridge Proprietors vs. Hoboken Co., 1 Wall., 146, the Court was construing a bridge charter which had an exclusive right for 99 years. And it says:

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"The parties who built the bridge had the positive enactment of the legislature, in the very Statute which authorized the contract with them, that no other bridge should be built. They had a grant of tolls on their bridge for ninety-nine years, and the prohibition against the erection of other bridges was the necessary and only means of securing to them **the monopoly** of those tolls. Without this, they would not have invested their money in building the bridges, which were then much needed, and which **could not have been built without some such security for a permanent and sufficient return for the capital so expended.**

On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other are wanting in no element necessary to constitute a contract. Such legislative provisions of the States have so often been held to be contracts, that a reference to authorities is superfluous."

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And yet it could have been said there, as it is here, that the Bridge Company was under no obligation, either to build the bridge originally, or maintain it during the 99 years, and therefore the contract was wanting in mutuality.

Our friends on the other side also contend that the Act of 1876 creates a tenancy at will on the part of the Coosaw Company, and therefore at will on the part of the State, citing Knight vs. Indiana Coal Co., 17 Am. Rep., 698. But that case distinctly recognizes the difference between such a tenancy and a license to mine, coupled with an interest in the license, or when it has been acted upon by the party to whom it has been granted, *in which case it is irrevocable*, so that that case answers itself. Besides the agreement in that case *expressly* stipulated that it was a tenancy at will.

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See, Hudson Canal Co. v. Penn. Coal Co. 8;

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10. What is the Character of the Coosaw Co's. Right under the Act of 1876?

We submit that it is an estate upon condition both as to the bed of the river and the deposit contained in it.

404 It is contended on the other side that the right of the Coosaw Co, is a mere *license* to dig and mine, and is, therefore, revocable by the State at pleasure. And among others the case of the State vs. The Pacific Guano Co. is cited as authority.

Assuming that it is a license, which we do not admit, it by no means follows that it is revocable. Gen. Conner, in his opinion also held the right, under the Act of 1870, to be a license, but a license on consideration, and therefore, 405 irrevocable. (Record, page 95). And he cites to sustain this position.

Wood vs. Leadbetter, 13 M. & W., 846.
2nd Am. Lead. cases, 738.
Hunt vs. Rousamanier, 8 Wh., 174.
Rerick vs. Kern, 14 Serg. and Raw, 267.

In South Carolina, however, the principle is settled by the case of Meetze vs. R. R. Co., 23 S. C., p. 1. The question there was a license claimed by the R. R. Co. to enter 406 on the land of the plaintiff, dig a canal, build a dam, erect water-wheel and use the same for a water supply to its tank, in consideration of certain privileges granted the plaintiff.

The plaintiff, on the other hand, claimed the right to revoke the license.

The Court, however, held that the license was irrevocable, being a power coupled with an interest.

See also, Snowden vs. Wilas, 19 Ind., 10.
Grubb vs. Bayard, 2 Wall, Jr., 96.

39 But we contend that the right of the Coosaw Co., is more than a mere license. That it is an estate upon condition.

In the State vs. Pacific Guano Co., the words construed by the Court as conferring simply a license, were the "right to dig, mine and remove phosphate rock, and phosphatic deposits from the beds of Bull River," etc. The Court held that these words simply conferred a right or privilege, a license to dig phosphates, but caused no interest in the soil. *But the Court did not hold that even this license was revocable.*

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So with Gen. Conner the words construed by him were "the right to dig and mine." (Record, page 95.) And he held those, under the circumstances, to constitute an irrevocable license.

But the Act of 1876, granted "the exclusive right, to *occupy* and dig, mine and remove,—a right much wider and more extended than a mere license to dig—in fact, an estate.

We have already called the attention of the Court to the significance of the word "*occupy*." We beg to refer here to 409
the authorities there quoted. They show that that word is one of possession, and the right to occupy gives the right to enter and possess.

Construing solely the Act of 1870, which did not have the word "occupy," Gen. Conner in his opinion, (Record, page 94,) says:—

"The only grant of the phosphates is when dug and removed, as of the deer when killed, in the case put by C. J. Vaughn (Vaughn's Reports, page 351.) **There are no words granting an estate or property in the soil or in the deposits.** "If as said (by C. J. Woodward.) 410
the grantee acquired no estate in the lands or mineral what is their right to be denominated? Answer. A license to work the lands for mineral. "Funk vs Halderman, 53 Penn. Reports, 243. And Mr. Bainbridge, in his treatise on the law of mines says, (page 300): 'There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands while the latter is only a mere incorporeal right to be exercised in the lands of others. In order to ascertain whether an instrument must be considered as a lease or a license it is only necessary to determine whether the grantee has acquired by it an estate in the land **in respect of which he might bring an action of ejectment. If the land is still to be considered in possession of** 411
the grantor the instrument will only amount to a license, and though

the grantee of the license will certainly be entitled to search and dig for mines according to the terms of his grant, and appropriate the produce to his own use on payment of the stipulated rent, yet he will acquire no property in the minerals till they are served from the land and have thus become liable in an action to trover."

"Is the grant in the present case a grant of an "actual interest, an estate in the land," in the beds of all the navigable waters of the State, or the grant of an incorporeal right, to be exercised on the lands of the State? Are the beds of the rivers in possession of the
412 grantees or in possession of the State? If still in possession of the State then on the authority just cited, the grant is only of a license.

"The express words of the Act seem to me to put this beyond question, for not only are there no words passing any interest or estate in land, but the express words used grant the right to "dig, mine and remove," and designate the fee to be paid before the right can be exercised as a "license fee."

But under the Act of 1876 the Coosaw Co. is given in addition the exclusive right to "*occupy*" a certain part of the Coosaw River, and to dig, mine and remove from it phos-
413 phates. It is not only put in possession, but it is entitled to the exclusive possession or occupancy, and, therefore, it has such an interest in the territory that it can maintain an action of ejectment. In other words it has an estate upon condition, both in the bed of the river and in the minerals.

We submit again that the "*exclusive* right to occupy and mine" rock passes the rock *in situ*.

In Caldwell vs. Fulton, 31 Pa. St., 475, there was a con-
414 veyance of one tract with "the full right, title and privilege of digging and taking away stone coal, to any extent" on an adjoining tract. And this was held, in an exhaustive opinion, in which all the authorities are reviewed, to constitute a conveyance of the entire ownership of the coal in place, beneath such adjoining tract.

The Court says:

"Applying these principles to the case in hand, why was not the deed of Caldwell to Greer a conveyance of the coal in the land owned and occupied by the grantor? Because, says the plaintiff in error, it is not a grant of the thing itself, but of a right to take it, and until it is
415 seized or taken the property in the thing remains in the grantor. But if the conveyance of the whole use of a thing and of the absolute

dominion over it, is a grant of the thing itself, only differing in the mode of describing the subject, it is not easy to see what more Caldwell could have sold than he did. If, in another form of words he had described the coal as the subject of the grant, Greer would have possessed no greater beneficial rights than were given to him by the form adopted.

"The ownership of the Coal in the ground is but a "full right, title and privilege" to dig and carry it away, nothing more, nothing less. The words employed in the deed express absolute dominion and complete enjoyment. These constitute property and all that 416
is understood in proprietorship."

When, then, the Coosaw Co. has the "exclusive right to occupy and mine, dig and remove," what more is necessary to vest in it the "ownership" of the phosphate rock, to "express absolute dominion and complete enjoyment?"

In the case of Clement vs. Youngman, 40 Pa. St., 344, the Court having a similar question before it, says:

"In Caldwell vs. Fulton, 7 Casey, 480, we held that a grant of an 417
unlimited right, title and privilege to dig and take away the coal in a designated tract of land, to any extent, the grantee might think proper, and for a consideration presently paid, was a grant of the coal itself, and not merely of a license or incorporeal right. That decision was made after much consideration, and after a careful review of both the English and American authorities. We see no reason to abandon the opinion we then entertained. **It is impossible to conceive of more complete dominion over coals or any mineral in place, in a tract of land, than that which is comprehended in an exclusive right to search for, to dig, raise and carry them all away. Such a right lacks nothing which is necessary to make up ownership.** A grant of it is, if possible, something more than a grant of the rents, issues and profits 418
of land, which has uniformly been held to be inferentially a grant of the land itself."

And this is again affirmed in Armstrong vs. Caldwell, 53, Pa. St., 284.

In Stockbridge Iron Co. vs. Hudson Ice Co., 107 Mass., 290, 322, the Court was considering a deed, in which the grantor reserved to himself "the right of mining on the granted premises," with right of entry, &c.

The Court held, that inasmuch as under the ordinary 419
terms of the grant the minerals passed, that the reservation

gave only a license to mine, concurrent with the grantee but says:

"The reservation of an **exclusive** right of this nature, might be held to retain in the grantor **the property in the mines**, operating as an exception from the grant. Cardegan vs. Armitage, 2 B. & C., 197 S. C., 3 D. & R. 414. Farnence vs. Platt, 8 Peck., 339. Munn vs. Stone. 4 Cush. 146. Jamaica Pond Aqueduct Co. vs. Chandler, 9 Allen, 159.

420 "But this grant is not exclusive. There is nothing in the deed to restrict the grantee from working the mines at the same time, even to the entire exhaustion of the ore. Bainbridge on Mines, (1st Am. Ed.) 269."

But under the Act of 1876, the Coosaw Co. has the "*exclusive* right to *occupy and dig, mine and remove.*" And therefore, it has a property in the phosphate rock. Because the grant of a thing can be no more than the grant of the exclusive right to the full and unlimited use of it.

See Morris vs. Phalen. 1 Watts, 389.

421 We therefore submit, in the light of these authorities, that the right of the Coosaw Co. under the Act of 1876, is a *continuing estate, with exclusive possession of the bed of the river, and right to mine the rock, on condition.*

We submit that this constitutes a clear corporeal hereditament, based on valuable consideration and irrevocable.

II. CAN THE RIGHT OF THE COOSAW COMPANY BE IMPEACHED BE
422 CAUSE IT IS EXCLUSIVE, OR, IN OTHER WORDS, A MONOPOLY?

We submit, that this is a matter exclusively within the power of the Legislature. If they have seen fit to grant exclusive rights, not as against the public health or the public morals, this Court cannot and will not interfere, but, on the contrary, will sustain and enforce such contracts.

As Judge Cooley, in his work on Const. Lim., 6th Ed., p. 343, says:

423 **" Under the rulings of the Federal Courts, the grant of any exclusive privilege by a State, if lawfully made, is a contract, and not lawful to be recalled."**

Or, to quote the words of this Court, in New Orleans Water Works Co. vs. Rivers, 115 U. S., p. 681:

"As the object to be attained was a public one, for which the State could make provision by Legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject or the grant, as in the judgment of the Legislative department would best promote the public health and the public comfort, or the protection of public and private property.

"Such was the nature of the plaintiff's grant, which, not being 424
at the time prohibited by the Constitution of the State, was a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law. It is as much a contract, within the meaning of the Constitution of the United States, as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point."

Contracts by States, with individuals or corporations, in which exclusive rights were granted, and practical monopo- 425
lies thereby created, have been frequently before the Courts of the United States, and never rejected on this ground, unless contrary to the public health or the public morals.

Indeed so far have the Courts gone, that States have been constantly held to have deprived themselves of the power of taxation by valid contracts.

We refer to:

The New Orleans Gas Co., vs. The Louisiana Light Co., 115th U. S., 671.

The Binghampton Bridge, 3rd Wall, 74. 426

The New Orleans Water Works Co., vs. Rivers, 115th U. S., 674.

The Louisville Gas Co., vs. The Citizens Gas Co., 115th U. S., 683.

The Slaughter House Cases, 16th Wall, 36 and 74.

Bridge vs. Hoboken, 1st Wall, 146.

McRoberts vs. Washburn, 10th Minnesota, 23.

Railroad vs. Railroad, 2d Gray, 34, and Cases cited.

Water Power Co., vs. R. R., 23 Pick, 303.

Railroad vs. Railroad, 13 How. 71. 427

Bridge vs. Dix, 6 How. 507.

VanHoffman vs. Quincey, 4 Wall, 514.

But even if the Court had the power, to look into the merits of the transaction, say whether it was wise or not, and were willing to exercise it, is there any room to assail this grant because it is exclusive?

We have already called the attention of the Court to the fact that in 1878 Gen. Conner in his opinion to the Legislature, pointed out to them that the best interests of the State
428 required that there should be a system of *exclusive rights and privileges*, granted to miners in fixed localities. (Record, pages 88 and 92.) And the Legislature showed its agreement in these views, by passing the Act of 1878, in which a large number of exclusive rights were granted.

But if higher or stronger proof is desired, we furnish it in the declaration of the relators in this very action, constituting the Board of Phosphate Commissioners for the State.

429 In their official communication to the Coosaw Co., 19th March, 1891, (Record, page 20,) they say:—

"Our observation of the mining around Beaufort has led us to believe that EXCLUSIVE RIGHTS ARE NOT DETRIMENTAL TO THE STATES INTEREST, and that it would be BEST FOR THE STATE AND THE MINERS WERE ALL THE MINING DONE BY ONE COMPANY."

With that admission on record, by the relators themselves, constituting the Board of Phosphate Commissioners of the State, it will not do to make any claim to the supposed hardship of the bargain.

430 The hardship, if any there was, was on the defendants who put up all the money, took all the risk and have enjoyed only the proper result of their energy, boldness and expenditure.

For after all, what constitutes this so much talked of "monopoly?" Simply in the exclusive right to occupy, and mine in, about seven miles of Coosaw River. There can be no pretence that other persons are kept out of the business. The State's phosphate territory extends over
431 hundreds of miles. The claim of the Coosaw Company embraces only seven.

But our friends on the other side urge, that the whole royalty of the State depends on the cancellation of this Coosaw contract. That unless the State can increase the royalty on all the companies, the Coosaw included, she can increase it on none. That therefore it is essentially and vitally important to the interests of the State, that it should be set aside.

There are two answers to this

First.—The royalty of one dollar per ton is a fair royalty 432
Gen. Conner so found and reported to the Legislature and the price has never risen to the suppositious figures suggested by him and there is no probability that they ever will. (Record p. 102.) The right therefore to raise the royalty is more sentimental than practical.

Second. But even were it otherwise, however, this Court can take no notice of any such suggestion. The rule is laid down in the case of the U. S. vs. The Union Pacific R R. Co., 91st U. S., page 91. 433

There in construing a contract between the Government and the Railroad, stress was laid upon the fact of the hardship to the Government from the alleged contract, but the Court says:

"Counsel have dwelt with special emphasis upon the consequences which would result from a decision adverse to the appellant (the Government.) We cannot consider them in disposing of the questions arising upon this record. The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit and intention, leave, in our opinion, no room for doubt as to its true meaning. **We cannot sit in judgment upon its wisdom or** 434
policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended."

EDWARD McCRADY.
EDWARD McCRADY, JR.
LOUIS DEB. McCRADY.
THOMAS W. BACOT.
McCRADY, SONS & BACOT,

AUGUSTINE T. SMYTHE.
A. MARKLEY LEE.
SMYTHE & LEE, 435

Solicitors for the Coosaw Mining Company, Appellant.

APPENDIX.

ACT OF 1878.

436

AN ACT TO PROTECT THE RIGHTS AND INTERESTS OF THE STATE IN THE PHOSPHATE ROCKS AND PHOSPHATIC DEPOSITS IN THE NAVIGABLE STREAMS AND WATERS OF THE STATE.

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That all charters for the purpose of digging,
437 mining and removing phosphate rocks and phosphatic deposits heretofore granted, which may be liable to amendment, modification or repeal by the law of the State, are hereby repealed, except such as are hereinafter expressly confirmed: *Provided*, The provisions of this section shall not go into operation until sixty days after the passage of this Act.

SEC. 2. That the following companies are hereby incorporated as hereinafter provided for the purpose of digging, mining and removing phosphate rocks and phosphatic de-
438 posits from the beds of the navigable streams and waters hereinafter mentioned, and the right to dig, mine and remove for the full term of ten years is hereby given, subject to the conditions, from the passage of this Act, upon the terms hereinafter mentioned to the said companies: 1. The South Carolina Phosphate and Phosphatic River Mining Company in the State of South Carolina. 2. The Marine and River Mining and Manufacturing Company of South Carolina. 3. The Boatman's Phosphate Company. 4. The Beaufort River Mining Company. 5. The Oak Point
439 Mines Company. 6. The Farmers' Phosphate Company. 7. The Palmetto Phosphate Company. 8. The Island

Coasting Phosphate and Phosphatic Marine and River Company, 9. The Beaufort and Port Royal Phosphate. Company. 10. The Sea Island Phosphate Company. The Hampton Phosphate Company. The Colleton Phosphate Company. The Friends' Mining and Manufacturing Company. Sheldon Phosphate Company. The Columbia Phosphate Company: *Provided*, That the said companies and their successors and assigns shall not in any way interfere with the free navigation of the navigable streams and waters of this State, nor with the private rights of any citizen or citizens residing upon or owning lands upon the banks of such streams and waters: *And provided, further*, That the stockholders in the said several companies shall be severally liable for the debts and liabilities of the said companies respectively until the full amount of the capital stock of such companies be paid in and no longer.

SEC. 3. That the persons hereinafter named as Commissioners for their respective companies shall, as soon as they conveniently can act after the passage of this Act, open books of subscription to the stock of the company for which they are appointed, at such time and place in the city of Charleston, or in the town of Beaufort, as they may designate, and of which time and place they shall give notice by advertisement for at least thirty days prior to the opening of the same in one or more of the newspapers of the said city of Charleston, and shall keep open the same for ten days between the hours of 9 A. M. and 3 P. M.; that when the books are closed the said Commissioners shall sum up the whole and ascertain whether the shares subscribed are equal in amount to the capital hereinafter prescribed for the company for which they are respectively appointed, or greater or less than the same. If the number of shares subscribed shall exceed the number of shares authorized for the said company, then the Commissioners shall divide sixty per cent. of the capital stock ratably among the subscribers to the capital stock whose subscriptions were made after forty per cent. of the capital stock had been subscribed, so that the number of shares shall not exceed that allowed by this Act, except that no subscrip-

tion of one share shall be reduced. If the number of shares be less than the number prescribed for the said company, the Commissioners for such company shall keep open the books until the full number of shares authorized by the said company shall be subscribed: *Provided*, That the Commissioners shall not keep open the same for a longer period than thirty days after opening the same. If any of the
444 Commissioners hereinafter named shall decline or fail to act, the remaining Commissioners or Commissioner for the Company for which such Commissioners or Commissioner was appointed shall appoint fit and proper persons or person to act in the place of such Commissioners or Commissioner, so declining or failing to act, or may themselves, if more than one proceed to open the books and receive subscriptions as herein provided; that subscribers making such subscription shall pay to the said Commissioners ten per cent. on each share subscribed, and the said Commissioners shall designate op-
445 posite the name of each subscriber the number of shares subscribed and the sum of money paid by each subscriber, and for the sum so paid the Commissioners shall give receipts to the subscriber so paying, and as soon as may be deposit the money in one of the national banks in the city of Charleston to the joint credit of a majority of the Commissioners until the said company is organized, and then subject to the check or order of the said company.

SEC. 4. That when the books are closed the Commissioners of each company shall appoint a time and place in
446 the city of Charleston or town of Beaufort for a meeting of the subscribers upon the books of said company for the purpose of organization, of which place and time the Commissioners shall give ten days' notice in some one or more of the newspapers of the city of Charleston and Beaufort, at which meeting the subscribers shall organize the said company by adopting such by-laws and electing such officers as shall be deemed proper for the organization of the said company.

SEC. 5. That the said corporations may each purchase
447 and hold such real estate as may be required for their purposes and may dispose of the same, and may erect such

mills, machine shops and other buildings thereon as may be deemed necessary; and may sue and be sued, have and use a common seal, and may make such by-laws for the government of the corporation, not inconsistent with the laws of this State, as may be deemed necessary; and shall have, generally, all the rights, powers and privileges in law incident or appertaining to similar corporations.

SEC. 6. That each and every of the said companies when 448
organized are hereby required to make to the Comptroller General true and lawful returns of the number of tons of the phosphate rocks and phosphatic deposits they may have dug, mined and removed and shipped or otherwise sent to market at the end of every month, and shall punctually pay to the State Treasurer the royalty provided by law to be paid thereon, to wit: One dollar upon each and every ton which has not been steam or kiln dried, and one dollar and ten cents upon every ton which has been steam or kiln dried, at the end of every quarter or three months—the first quarter to 449
commence to run on the first day of March of each year. That upon the organization of each and every of the said companies, as a condition precedent to the right to dig, mine and remove the said rocks and deposits hereby granted, each company shall enter into bond with security in the penal sum of one-half of its capital, not, however, to exceed fifty thousand dollars, ($50,000.) conditioned for the payment of said royalty *in accordance with the Act of the General Assembly entitled "An Act to settle definitely the periods at which returns shall be made of phosphate rocks* 450
and phosphatic deposits dug and mined in the beds and navigable streams of the waters of South Carolina and the royalty shall be paid thereon, and also to fix the terms on which this Act may be accepted by the parties therein," approved 28th March, 1876, which bond and the sureties thereon shall be subject to the approval now required by law for the bonds of State officers, and the company upon so doing shall thereupon become and be subject to all the provisions of the said Act approved March, 28th 1876.

451

SEC. 7 That it shall be the duty of the Comptroller

General to inspect the works and examine into the working of each company hereby incorporated, and to report annually to the General Assembly any and all such as, in his opinion, have or have not prosecuted the work of mining and searching for said phosphate rock and phosphatic deposits to the interests of the State; and in case it shall appear that any company hereby granted exclusive rights
452 shall be in possession of more territory than they have the power to develop, or are not developing the same to the best interest of the State, he shall report the same, with all the facts relating thereto, to the General Assembly, to the end that the amount of territory may be diminished should it be deemed expedient by the General Assembly to do so; and in case it shall appear that the territory granted to any company can develop to the best interest of the State, the Comptroller General shall likewise report the same to the General Assembly, with all the facts, to the
453 end that the amount of territory may be increased should General Assembly deem it expedient to do so.

SEC. 8. That the stock of the South Carolina Phosphate and Phosphatic River Mining Company shall consist of one thousand shares of one hundred dollars each; that A. Canale, E. Willis, and A. G. Magrath. Jr., are hereby appointed Commissioners to take up subscriptions to the stock of the said company in the manner as hereinbefore provided; that the said company, when organized in accordance with the provisions of this Act, shall have the
454 exclusive right to dig and mine and remove phosphate rock and phosphatic deposits from the beds of the following streams, to wit; from all parts of Edisto River up to the Savannah and Charleston Railroad bridge.

SEC. 9. That the stock of the Boatman's Phosphate Company of South Carolina shall consist of three thousand shares of ten dollars each, and that W. T. Elfe, A. J. Moses and J. A. Caswell are hereby appointed Commissioners to take subscriptions to the stock of the said company in the manner hereinbefore provided. That the said
455 company, when so organized in accordance with the provisions of this Act, shall have the exclusive right to dig,

mine and remove phosphate rock and phosphatic deposits from the bed of Morgan River and its tributaries and the other waters and marshes South of and opposite Morgan's Island, saving and excepting any such tributaries and such waters the exclusive privilege wherein may by this Act be granted to any other company.

SEC. 10. That the stock of the Beaufort River Mining Company shall consist of six thousand shares of twenty- 456
five dollars each, that E. L. Roche, William Elliott and J. Bennett Bissell are hereby appointed Commissioners to take subscriptions to the capital stock of said company in the manner hereinbefore prescribed; and that the said company, when organized in accordance with the provisions of this Act, shall have the exclusive right to dig, mine and remove phosphate rocks and phosphatic deposits from the beds of Parrott Creek and Beaufort River: *Provided*, That the said company locate its works at some point at or near the town of Beaufort. 457

SEC. 11. That the stock of the Oak Point Company shall consist of two thousand shares at one hundred dollars each; that David Roberts, C. K. Huger and S. R. Stoney are hereby appointed Commissioners to take subscriptions to the capital stock of said company in the manner hereinbefore provided; that the said company, when organized in accordance with the provisions of this Act, shall have the exclusive right to dig, mine and remove phosphate rock and phosphatic deposits from the beds of Bull River and North and South Wimbee Creeks. 458

SEC. 12. That the stock of the Farmers' Phosphate Company shall consist of two hundred shares of fifty dollars, with the privilege, after organization of said company, of increasing the capital stock to any sum not exceeding one hundred thousand dollars; that T. George Vose, A. M. Salley and George P Bamberg are appointed Commissioners to take subscriptions to the capital stock of said company in the manner hereinbefore provided; that said company, when organized in accordance with the provisions of this Act, shall have *the exclusive right* to dig, mine and 459
remove phosphate rocks and phosphatic deposits from the

beds of Whale Branch River and its tributaries from Broad River to Coosaw River *and from the bed of Coosaw River, excepting all that part of Coosaw River which lies opposite to and South of Chisolm's Island, whereon the works of the Coosaw Mining Company are located, and to the marshes thereof, which was occupied by the said Coosaw Mining Company, and which was exclusively granted to the Coosaw Mining*
460 *Company by Act of the General Assembly, No. 199, approved March 28, 1876.*

SEC. 13. That the stock of the Island Coasting Phosphate and Phosphatic Marine and River Company shall consist of four hundred shares of twenty-five dollars each; that James Powers, Charles Deignan and Henry Miles are hereby appointed Commissioners to take subscription to the capital stock of the said company in the manner hereinbefore provided; that when said company shall be organized, in accordance with the provisions of this Act,
461 it shall have the exclusive right to dig, mine and remove phosphate rocks and phosphatic deposits from the beds of Ashepoo and Combahee.

SEC. 14. That the stock of the Palmetto Phosphate Company shall consist of one thousand shares of one hundred dollars each. That Charles C. Pinckney, Jr., Isaac Hayne and Samuel J. Pregnall are hereby appointed Commissioners to take subscription to the stock of the said company in the manner as hereinbefore provided. That the said company, when organized in accordance with the provisions
462 of this Act, shall have the exclusive right to dig, mine and remove phosphate rocks and phosphatic deposits from the beds of the following streams, to wit: From all parts of Ashley and Wando Rivers and Church Creek.

SEC. 15. That the Marine and River Mining and Manufacturing Company of South Carolina, upon its surrendering the general right claimed by it under the Act of Assembly approved 13th March, 1870, to dig, mine and remove phosphate rocks and phosphatic deposits from the beds of the navigable streams and waters of the State, which surrender
463 and acceptance of the provisions of this Act shall be signified in writing to the Comptroller General within ninety days from the passage of this Act, and confining itself for

the said purposes to the Stono River and its tributaries, including Wappoo Cut, Cooper River and its tributaries, except Wando River; and upon the said company paying or securing to the satisfaction of the Comptroller General, to be paid within sixty days from the passage of this Act, the sum of thirty-five thousand dollars in full discharge of royalty reported by the Comptroller General to be due on the first day of September last by the said company, and upon the acceptance of the aforesaid conditions, as hereinafter provided, and of the provisions of the said Act of 1876, shall have the right, and is hereby empowered, to consolidate the present shares, to wit: Five thousand in number, of its capital stock at a rate not to exceed two for one, and to assess such shares, whether consolidated or not, at a rate not exceeding thirty dollars per share, and to enforce the payment thereof by the sale of such shares so assessed; and for the shares thus created by such consolidation of the present shares, (say 2,500,) two thousand five hundred, C. T. Mitchell, L. D. Mowry and John D. Alexander are hereby appointed Commissioners to open books for subscription in the manner and form hereinbefore provided. 464 465

SEC. 16. That the stock of the Beaufort and Port Royal Phosphate Company shall consist of three thousand (3,000) shares of ten ($10) dollars each. That James M. Crofut, F. W. Scheper and P. L. Wiggin are appointed Commissioners to take subscription to the capital stock of the said company in the manner hereinbefore provided. That when the said company is organized in accordance with the provisions of this Act, it shall have exclusive right to dig, mine and remove phosphate rocks and phosphatic deposits from the beds of Johnson's River and Battery River. 466

SEC. 17. That the stock of the Sea Island Phosphate Company shall consist of one thousand shares, fifty dollars each; and that Oliver W. Barnes, Justice P. P. Willey, Robert I. S. White, E. F. Boddington, J. W. Seabrook, S. D. Gilbert and A. Williams are hereby appointed Commissioners for the purpose of receiving subscriptions to the capital stock in the manner hereinbefore provided. That when the said company shall have been organized in accord- 467

ance with the provisions of this Act, it shall have the exclusive right to dig, mine and remove phosphate rocks and phosphatic deposits from Station Creek, Skull Creek, May River and tributaries.

SEC. 18. That the stock of the Port Royal Phosphate Company shall consist of two hundred shares of one hundred dollars each, with liberty to increase the same to two
468 thousand shares; and that William Gregg, E. M. Seabrook and W. M. Smith are appointed Commissioners to take subscriptions to the capital stock of the said company in the manner hereinbefore provided. That when the said company is organized in accordance with the provisions of this Act, it shall have the exclusive right to dig, mine and remove phosphate rocks and phosphatic deposits from Hazard and Archer's Creeks, Colleton River and tributaries.

SEC. 19. That the Stock of the Colleton Phosphate Company shall consist of six hundred shares of fifty dol-
469 lars each; that A. Wickman, F. G. Behre and H. E. Bissell, F. C. Fishburne, J. M, Warren, W. E. Capers, A. Bennett, J. W. Davis, L. E. Parler, J. N. Cumming and E. Murray are appointed Commissioners to take subscription to the capital stock of said company in the manner heretofore provided, except that said Commissioners may open their books in Walterboro if they think proper; that when the said company is organized in accordance with the provisions of this Act, it shall have the exclusive right to dig, mine and remove phosphate rocks in so much of the beds
470 of Edisto River as lie above the bridge of the Savannah and Charleston Railroad Company as far as Razor's Bridge.

SEC. 20. That the stock of the Friends' Mining and Manufacturing Company shall consist of one thousand shares of fifty dollars each ($50); that R. A. Kendall, Edward Middleton and F. Gregorie are appointed Commissioners to take subscription to the capital stock of said company in the manner hereinbefore provided. The said company, when organized in accordance with the provisions of this Act, shall have the right to dig, mine and remove phosphate rocks and phos-
471 phatic deposits from any of the streams and navigable waters of this State, except such streams and waters and such

portions thereof as have been or may be granted to the exclusive use of some other Company or persons.

SEC. 21. That the stock of the Columbia Phosphate Company shall consist of two hundred (200) shares of fifty dollars each, with the privilege of increasing the same to one hundred and fifty thousand dollars; that William M. Smith, R. G. Fleming and F. C. Fishburne are hereby appointed Commissioners to take subscription to the capital stock of said company 472
in the manner hereinbefore provided; that when the said company is organized in accordance with the provisions of this Act, it shall have the right to dig, mine and remove phosphate rocks and phosphatic deposits from any of the streams and navigable waters of this State, except such streams and such portions thereof as have been granted the exclusive right to mine, dig and remove phosphate rock and phosphatic deposits to some other company or individuals.

SEC. 22. That in case any company hereby incorporated to whom exclusive territorial rights have not been granted 473
shall discover and begin to mine any bed or beds of phosphate rocks and phosphatic deposits in any of the navigable streams and waters of this State from which phosphate rock and phosphatic deposits have not been previously mined, such company shall have the exclusive right to dig, mine and remove such phosphate rock and phosphatic deposits from the bed or beds so discovered and mined: *Provided*, That such bed or beds shall not cover an area exceeding fifteen miles: *And provided, further*, That nothing herein contained shall be so construed as to give to any such com- 474
pany the right to dig and mine in any streams or parts of streams or waters to which exclusive rights have otherwise been granted.

SEC. 23. That the stock of the Hampton Phosphate Company shall consist of one thousand shares of one hundred dollars each; that J. B. Sardy and Arthur C Sardy are appointed to take subscription to the capital stock of the said company in the manner hereinbefore provided; that the said company, when organized in accordance with the provisions of this Act, shall have the exclusive right to dig, 475
mine and remove phosphate rock and phosphatic deposits

from the bed of Edisto River, from Razor's Bridge to Orangeburg line, Filbear's Creek and Goose Creek.

SEC. 24. That from and after the passage of this Act the South Carolina Phosphate Company (limited), otherwise known as Oak Point Mines, be, and the same are, required to pay to the State the full royalty of one dollar per ton upon all rock dug, mined and removed from North and South
476 Wimbee Creeks below low water mark adjacent to the lands of the said company, or elsewhere, in the waters of the said creeks, subject to the jurisdiction of the State: *Provided*, That upon the acceptance of the rights conferred by this Act all the companies hereby chartered shall surrender and forfeit all grants, rights and privileges heretofore acquired under any previous Act or Acts of the Legislature, and nothing herein contained shall confirm any previous rights.

SEC. 25. That any company hereinbefore authorized to be incorporated which shall fail to be fully organized by having
477 at least one-half of its stock paid in, and to be at work by the first of November, 1878, all its rights and franchises under this Act shall then cease and determine.

SEC. 26. That the right to mine in the streams above mentioned shall include the right to mine in the creeks and waters thereof except when such creeks and waters have been given to some other company or corporation.

SEC. 27. That it is hereby declared that any and every company digging and mining under the provisions of the Act approved 28th March, 1876, and of this Act, shall be
478 considered and regarded as having punctually paid the royalty as therein provided if the same be actually paid to the State Treasurer within ten days from the end of any quarter when the same became due: *Provided*, That nothing herein contained shall be construed to excuse or justify any breach of the provisions of said Act or in any way to confirm any rights alleged or claimed to have been granted: *Provided, further*, That nothing herein contained shall deprive the citizens of this State who have no means to take stock in a corporation of the right to mine phosphate rock, upon securing the roy-
479 alty to the State, from the bar of Charleston to the city of Charleston.

Approved March 22, 1878.

Office Supreme Court U. S.
FILED.
MAR 8 1892
JAMES H. McKENNEY.
CLERK.

FOR THE COOSAW MINING COMPANY.

IN THE MATTER OF THE OPINION OF EDWARD McCRADY.

CHARLESTON, S. C., July 2nd, 1884.

Edward McCrady, Esq., Charleston, S. C.:

MY DEAR SIR:—The death of Mr. Campbell leaves you not only the senior counsel of the Coosaw Mining Company, a position you have always held, but also the only one surviving conversant with the legal business of the company, by actual participation from our organization.

You, of course, remember our talking with you some years ago in reference to the tenure of the grant held by the company from the State, as affected by the Act of 1876. Your opinion, then so well expressed, was never put in writing. I have heard nothing at all which would lead me to suppose that the State does not accept the position always taken by the company, that our grant is one in perpetuity upon conditions; in fact the subsequent action of the State has satisfied me that they acquiesce in that position.

I think, however, it would be valuable and interesting for the company to have your opinion as to the tenure of our grant, written as it would be, and as you now alone could write it, from your actual participation in all the legal matters of the company from the beginning.

I sincerely hope and trust that you will be long spared to us, for you are now well advanced in years and we cannot tell what is before us. After you there is no one who could write just the opinion that you could, for no one now living has just that personal knowledge that you have.

I shall be therefore, very much obliged, if at your convenience, you could prepare and let me have your opinion,

in writing and at length, as to the present relations of the company to the State, and especially as to the tenure of the grant under which we are now working.

Trusting that you may long be with us to guide and counsel us, I am Yours, very truly,

ROBERT ADGER,

Chief Manager of the Coosaw Mining Company.

CHARLESTON, S. C., 22nd October, 1884.

Robert Adger, Esq., Chief Manager of the Coosaw Mining Company:

MY DEAR SIR: Enclosed you will find my opinion upon the Coosaw Mining Company's tenure of a right to mine phosphates in Coosaw River. With it I enclose two letters from the Comptroller General's office to our Secretary, Andrew Adger, both dated in October, 1875, which I think very important. The opinion has caused me many weeks of patient labor and reflection, and I think you will observe that it is not in the form of an argument to sustain a claim, but really, as it should be, only the presentation of considerations occurring to me as I proceeded in a review of Gen. Conner's opinion, and the legislation upon the subject, connected with what was *personally known to me.* The result is a thorough conviction in my own mind that a fair presentation of all that might be said in favor of my conclusion, before an impartial and educated judiciary, as we have every reason to hope will be ours in 1891, would fully establish the indefinite conditional right.

As it is very improbable that I shall be here at that time, and if here, quite certain that I could not be of any use to the Company, I am glad to leave my opinion behind me.

I am yours, truly and respectfully,

EDWARD McCRADY,

Senior Solicitor of the Coosaw Mining Co.

FOR THE COOSAW MINING CO.

OPINION BY EDWARD McCRADY UPON THE CONSTRUCTION OF THE ACT OF 1876.

QUESTION: Is the license granted to the Coosaw Mining Company limited to twenty-one years, or extended indefinitely upon condition?

To answer this question it will be necessary to consider almost all the Acts of the Legislature which have granted such licenses.

(1.) The first Act, was that of 1st March, 1870, (14 Stat., 381,) entitled, "An Act to grant to certain persons therein named, and their associates, the right to dig and mine in the beds of the navigable streams and water courses of the State of South Carolina for phosphate rock and phosphatic deposits." This Act "did give and grant" to Geo. W. Williams and seven others named therein, "and such other persons as they may associate with them, the right to dig, mine and remove, for the full term of twenty-one years, from the beds of the navigable streams and waters within the jurisdiction of the State of South Carolina, the phosphate rocks and phosphatic deposits: Provided, that the persons named, and their associates, shall not in any way interfere with the free navigation of" said streams, or the private rights of any citizen or citizens residing upon or owning lands upon the banks of said streams.

2nd. Fixed the royalty to be paid by grantees at one dollar per ton for every ton dug, mined and removed from the said navigable rivers, &c., and $500 as a license fee before commencing business under such grant.

3rd. Required bond to be given by said grantees and

their associates, to secure payment of the stipulated royalty annually on the first day of October. The books of said grantees and their associates shall be opened to the inspection of the State Auditor or agent.

It is to be observed that the grant is to the persons named in the Act and their associates, and these are not incorporated. These associates, therefore, were as directly the grantees of the State as were those named in the Act. Of these associates, many had been selected even before the passage of the Act. All these grantees and their associates soon found that the territory to be mined was in so many different streams, so widely distant from each other, as to require a division of labor, and very soon came to an agreement among themselves how they would divide and locate themselves. Those, who agreed to associate themselves to work on the Coosaw River, covenanted with the others to work there and to pay the royalty, and not to work anywhere else—the others covenanting not to work or interfere with them in the Coosaw River. Those, who agreed to work in the Coosaw River only, formed a partnership for the purpose among themselves, in the manner of the English mining copartnerships, and commenced their work as direct grantees of the State. They did not take any assignment from the River and Marine Company, but held under the original grant as if they had been named in the Act. Those named in the Act, however, (after the covenant for division of operations was made,) sought and obtained a charter of incorporation from the Clerk of the Court at Charleston, under the name of The Marine and River Phosphate Mining and Manufacturing Company of South Carolina, and claimed and had the right to mine for phosphates everywhere except in Coosaw River. This left the Coosaw Mining Company, as far as the grants then existed, in the exclusive occupation and right to mine the whole of the Coosaw River, and they forthwith set to work to establish works and gather plant sufficient for the purpose.

(2.) The next Act granting mining rights in the rivers was approved 9th March, 1871, (14 Stat., 688,) entitled, " An Act

to charter the South Carolina Phosphate and Phosphatic River and Mining Company in the State of South Carolina, and to grant to the persons therein named and their associates, the right to dig and mine in the beds of the navigable streams and water courses of the State of South Carolina."

This Act grants to the individuals therein named all the rights granted to Geo. W. Williams and others by the A. A. 1870, and in the same words, and then incorporates them. This Company never established itself anywhere, but let any one who would dig for them go into Stono River, where the Marine and River Company had two dredges at work, but had made no other sort of occupation of it. This grant was for thirty years from 9th March, 1871.

(3.) The next Act was approved 29th January, 1874, (15 Stat., 530.) It incorporated the Boatmen's Company, in the same way, naming several persons and their associates, granting the right in the same way for thirty years. Both these last mentioned grantees, it will be seen, held grants in the very same terms as the grantees of 1st March, 1870, without any limitation as to location, and neither ever located works or plant of any kind permanently on any navigable stream or water course of the State.

In 1876, 16 Stat., 198, an Act, which we are to construe, was passed under these circumstances. The Comptroller General of the State, in a communication to Mr. A. M. Adger as the Secretary of the Coosaw Company, dated 2nd October, 1875, after showing the difference between the amounts of rock dug and paid for, wrote as follows: "I shall insist on the payment for every ton, 'dug, mined or removed,' as the Statute requires, and not for the amount exported from the State, which seems to be the basis on which you make your payments." The Coosaw Company, up to that time, had been paying only on what they exported, not that they claimed that the payments were to be made only on *exported* rock, but because that was the only way in which they had ever sent the rock to market, and their position was, that not the mere lifting of the rock from the bed of the river, but the fitting and setting it out on its

way to a market, made them liable, as much had to be done after the rock was lifted to fit it for a market, all of which was a part of the mining process, and their exportation was the best mode of ascertaining what was to be paid for; and this construction had been acquiesced in by all the then Comptroller's predecessors in office.

This communication was submited to me as solicitor and counsel of the Company for my opinion as to its obligation to comply with this demand. After a careful examination of the question, I gave a written opinion and pointed out the Comptroller General's error in quoting the words of the Act of 1870—as "dug, mined *or* removed"—when the true reading was "dug, mined *and* removed," and advised that his demand should be refused. This opinion (which went fully into the merits of the demand and the reasons for my opinion and advice) or a copy of it was sent to the Comptroller General, who thereupon determined to apply to the Legislature for legislation on this subject. Upon learning this my opinion was printed in pamphlet form and copies furnished to the members of the Legislature. It was in this manner that the subject was brought before the Legislature at its next session. The Coosaw Mining Company made no application to the Legislature. They sought no legislative relief. All they asked was to be let alone subject to the Act of 1870 and its contemporaneous construction, sustained by my opinion in support of that construction.

This Act of 1876, 16 Stat. 198, was entitled "An Act to settle definitely the periods at which returns shall be made of phosphate rock and phosphatic deposits, dug and mined in the beds of the navigable streams and water courses of the State of South Carolina, and the royalty shall be paid thereon, and also to fix the terms on which this Act may be accepted by the parties therein named." This title will upon reading the Act be found very apt to express all its provisions. The Act begins with a preamble in these words, "whereas differences have arisen between the Coosaw Mining Company and the Comptroller General as to the time and manner in which the said Company shall make their returns of the

number of tons of phosphate rock and phosphatic deposits dug, mined and removed by them from the beds of the navigable streams and waters of the State, and also as to the times when the royalty thereon shall be paid; therefore, for remedy thereof." Then follows three sections enacting as follows:

Sec. 1 enacts, That the said Coosaw Mining Company and all other companies and persons engaged in digging, mining and removing phosphate rock and phosphatic deposits from the beds of the navigable streams and waters of the State shall be and they are hereby required from and after the passage of this Act to make to the Comptroller General true and faithful returns of the number of tons of phosphate rock and phosphatic deposits they have so dug, mined and removed and shipped or otherwise sent to market at the end of every month, and shall punctually pay to the State Treasurer the royalty already provided by law to be paid thereon at the end of every quarter or three months, the first quarter to commence to run on the first day of March of the present year.

Sec. 2 enacts, That the Coosaw Mining Company and all other companies and persons mentioned in the preceding Section shall within ten days from the passage of this Act enter into new bonds in the penal sums, and in manner and form already provided by law, but conforming in their conditions to the terms set forth in the preceding Section, and also pay to the State Treasurer the royalty accrued up to the said first of March in the present year. This Section contains no further enactment, but it being clear that such changes in the previous grants thus made could not be enforced, if resisted by the grantees holding under the former grants, and who had expended money in pursuance of the invitation or offer made to them in those grants, this section proceeds with a recital explanatory of the offers made in the next two sections thus, "*And whereas*, it is desirable that the said Coosaw Mining Company and all other companies and persons engaged in digging and removing phosphate rocks and phosphatic deposits as aforesaid shall

accept the terms of this Act in order to make it binding on them respectively. And whereas the said Coosaw Mining Company have already occupied so much of the Coosaw River as lies opposite to and south of Chisolm's Island, whereon their works are located, and the marshes thereof, and have expended large sums of money in establishing themselves thereon with sufficient mining plant for mining and preparing for market the phosphate rocks and phosphatic deposits of that part of the said Coosaw River therefore in consideration thereof, &c."

Sec. 3 enacts, That the said Coosaw Mining Company, on accepting the terms of this Act within ten days from the passage thereof, shall thenceforth have the exclusive right to occupy and dig, mine and remove phosphate rocks and phosphatic deposits from all that part of the Coosaw River above mentioned, *so long as and no longer than they shall make true and faithful returns of the number of tons they shall so dig, mine and remove and ship or otherwise send to market and punctually pay the royalty thereon as provided in the first section of this Act.*

Sec. 4 enacts the extension of this same exclusive privilege to all other companies and persons engaged in digging, mining and removing phosphates from the navigable streams and waters under the gift and grant of the State, who should accept terms of the Act within ten days, where they have respectively occupied and established themselves for mining purposes, on the same limitations as prescribed in the preceding section.

Sec. 5 repeals all Acts inconsistent with this Act.

My opinion is asked because the late Gen'l Conner, when Attorney General, in making a report to the Legislature under a joint resolution, approved 9th June, 1877, directing him to inquire into the matter of the several charters heretofore granted to the phosphate companies in the State, with a view to define and protect the rights and interests of the State therein, and to consider and determine the necessity, if such exist, of repealing the charters of some or all of the said companies, "and to ascertain what amount

is due to the State for royalty by any of the companies or individuals authorized to dig, mine and remove phosphate rock, and to institute proceedings to recover the same for the use of the State." (I quote this joint resolution in the words of Gen'l Conner's opinion, dated 1st December, 1877.) It is apparent from this that the Attorney General was not called upon to construe the Act of 1876 in relation to the duration of the rights of the Coosaw Mining Company, as that was not an incorporated company, and as to individuals he was only required to ascertain what was due by them to the State for royalty. Still the opinion of Gen'l Conner deserves the most serious consideration where he has given it to the Legislature, even when not required by them, and I shall examine it fully and most respectfully, and certainly shall consider that that opinion contains all that can be offered in support of his conclusion that the Act of 1876 limits the exclusive right to the original term granted in 1870.

In examining this conclusion, our first observation is that such a construction must either leave it optional with the Coosaw and Oak Point Mines Companies to go back to the original grant of 1870, if they found that more convenient, or subjects them to a forfeiture of all their rights to mine. For brevity, I will use the name of the Coosaw Company only, as that is expressly mentioned most frequently by General Conner. Is it optional with the Coosaw Company to go back to its original grant of 1870? It is certainly conceivable that in 1876 this might have been contemplated as desirable. If it were fully ascertained that there was not phosphate enough in the Coosaw River to make mining profitable for more than the remaining period of the grant of 1870, the new terms of paying quarterly were much less agreeable than paying annually. At such a time as the present, a dividend among the associates of what has been paid to the State in royalty, and deferring that payment, would certainly have been very advantageous to these associates. Whether such a failure of phosphates as has been suggested might have occurred or not, need not be discussed—

it was then and still is a possibility. And the question is, could the Coosaw Company go back to its old grant if it were profitable to do so? Can this right be reconciled with the other provisions of the Act, which Gen'l Conner says "recognizes the right of the Coosaw Company as already existing and converts it from a right which might be shared in by others into an exclusive right enjoyable only by the Coosaw Company"? "It changes the quality of the right and makes it exclusive, 'so long as and no longer than' the conditions, on which the exclusive character depends, are performed, but it is silent as to the quantity or duration of the right. That depends upon the terms of the original grant."

The quantity, if it was intended to be any other than that described by the words "so long as and no longer than" the conditions are performed, certainly ought to have been expressed, for that quantity "so long as and no longer than" the conditions are performed is unambiguous, and precisely the quantity we claim, because it is so plainly expressed and enacted without any indication that it was not a correct description. Silence after these words only establishes the correctness of our construction. Gen'l Conner, in order to reach his conclusion, requires us to put an unnatural construction on these words by reference to another Act not mentioned in this Act, and which, in so far as it might be inconsistent with this Act of 1876, is expressly repealed.

Gen'l Conner, in a subsequent paragraph of his opinion, admits that "there was the substitution of an exclusive for a general right," but denies that this substitution extends the duration of the right from a term of years to perpetuity, because that would violate a settled rule of construction applicable to Statutes containing public grants. Now any other construction, than such as must extend the term, would be contrary to the whole purpose and spirit of the Act of 1876. If there was a substitution, what became of the old grant? Did it continue to exist, but be in abeyance until a failure of performance of the conditions occurred and then to revive? This is necessary to support this con-

struction of Gen'l Conner. But this is in opposition to all the provisions of the Act. For the Act of 1876 required the Coosaw Company to pay a round sum down within ten days, and changed the period of payment of royalty from annual to quarterly. If the original grant was to be in *abeyance* until the failure to perform the conditions, and then to revive, certainly it must revive in all the terms of the original, and then the payment of royalty would be annual and not quarterly. Now the Legislature carefully guarded against this recurrence to the original grant by requiring the Company to give *new* bonds to pay quarterly, and that within ten days. The annual payments were never intended to be restored, and therefore the terms of the original grant could never be revived. When the company accepted the Act, paid its money down, and gave its new bonds to pay *quarterly*, they got an exclusive right, not in perpetuity, but for the time designated in the Act, "so long as and no longer than" than they performed the conditions imposed by the Act, the limitation of the term being what was uncertain then and is uncertain now, namely: How long phosphates could or can be mined in Coosaw River to pay the royalty and a sufficient profit to induce the carrying on of the business. The old grant was swallowed up in the new, and the right to mine now exists and can be continued only upon performance of the conditions stipulated, and a failure in the performance expressly puts an end to the right to mine in Coosaw River. So the Coosaw Company was obliged, in order to obtain the new grant for an indefinite period dependent upon the phosphatic deposit in Coosaw River capable of being mined, to accept a grant subject to forfeiture when there was no clause of forfeiture in the original grant.

The Coosaw Mining Company is recognized by the Attorney General to be a joint stock (and not an incorporated) company, with a capital of $275,000 all paid in; and he also recognizes that in 1870, the year of the original grant, this company purchased or leased a part of Chisolm's Island on Coosaw River, and there located its works and

machinery, and commenced mining operations in Coosaw River, but adds that this was done by virtue of an agreement with the Marine and River Mining Company, under the license or right granted by the State to that Company; and in another place says that the Coosaw Company derived their right from others. This is a mistake. The Coosaw Mining Company took nothing from the Marine and River Mining Company. Most or all of the members of the Coosaw Mining Company were contemplated as associates of the grantees named in the Act of 1870, or were actually associated with those guarantees *before* the Marine and River Mining Company was incorporated. These individuals, each claiming the right granted by the Act of 1870, realizing the impracticability of managing the mining business in all the rivers of the State, at one and the same time, by one company incorporated or only associated as a partnership, agreed among themselves to separate their labors and efforts. And they agreed to allow different parties of them to apply and confine themselves to particular locations. And this was carried out not by assignments of rights or grants of privileges, but by mutual covenants. The persons forming the Coosaw Mining Company as a partnership formed according to the plan of mining companies in England covenanting to dig nowhere else than in the Coosaw River, and all the other grantees and their associates covenanting that they would not mine in the Coosaw River, so that the Coosaw Mining Company partnership acquired the sole right to mine in that river, so far as the State had then granted these rights.

And here it must be observed that this grant of 1870 was not a grant of any sovereign right or privilege to be exercised by a few at the expense of or in derogation of the rights or liberties of their fellow citizens, but a right to enjoy a certain property of the State for the benefit of the State as well as for their own profit. The State could not grant the beds of the navigable streams, for these streams were free to all the citizens of the other States, and Congress might interfere with those streams to make them more navi-

gable than they were originally. All the right the State could grant was the right to dig and mine in these streams whatever might be found in them capable of being mined. And when the Coosaw partnership fixed their plant on Chisolm's Island, and set their dredges, washers, flats and tugs to work in the river, they took possession of this property as perfectly as one who has attained a grant of land (when he runs the lines and encloses it with a fence or builds a house upon it), and secured the exclusive right to dig and mine in that portion of the river they had occupied and were actually engaged in mining.

The Attorney General, in his opinion, says that it was decided in a case of the Marine and River Mining Company *against* the South Carolina Phosphate &c. Company, that the Act of 1870 did not give an exclusive right to the grantees—this is true, as to the exclusive right claimed by them as to all the streams and navigable waters of the whole State—but the point we make, we have good reason to believe would have been decided in their favor, if that company had secured a location on the Stono River so as to have made its possession permanent and not transient as it was; only with two dredges and wash boats which could be moved at any time: or even if the complaint in that case had stated a positive interference with their dredges and washboats, which unfortunately, accidentally or improvidently was omitted, although it was drafted and intended to have been inserted.

The position, that when the Coosaw Mining Co. made a permanent location on Chisolm's Island and put into the river mining plant sufficient to mine the phosphates therein they secured the *exclusive* right to all the right they had in that river, is justified and established by many authorities.

An apt illustration of this position may be found in the planting of oysters for growth and cultivation in bays and arms of the sea common to all. The law allows the appropriation of a portion of this common field, at one's own option, without a specific grant. It only need be marked out by

metes and bounds and indicated only by stakes or buoys as his field for planting and cultivating of oysters.

This has been recognized in several cases, the first of which is to be found in 14 Wend, p. 42, entitled Fleet *vs.* Hegeman, decided by a Judge whose authority might well be deferred to by any Court, Nelson J., then of the Supreme Court of New York, afterwards of the Supreme Court of the United States The head note of the case is "Oysters planted by an individual in a bed clearly designated and marked out, in a bay or arm of the sea, which is a common fishery to all the inhabitants of the town in which the bay is situated, are the property of him who planted them, and for any interference with them by another *trespass lies.*" Judge Nelson, in his opinion, says: "But while they continue the owner's qualified property, they are under the protection of the law, as much so as if they were absolutely and indefeasibly his; and an action will lie for any injury committed"—and concludes his opinion with these sentences: "The case presents a deliberate and wanton violation of property, acquired by the industry and care of another, under the pretext of exercising *a right* in common, which the defendants knew to be fruitless. We certainly would have regretted if the law had given countenance to such depredations, and we are rejoiced to find they are as gross a violation of the law as they are of the first principles of justice."

In the case of Decker *vs.* Fisher, 4 Barbour's, p. 522, a similar case of trespass, in a part of Prince's Bay, which was common to all, Judge Strong says that the case last mentioned, Fleet *vs.* Hegemen, was conclusive. The reasons upon which that case was decided are equally applicable to navigable waters, which are free for all the inhabitants of the State. Conversion was not necessary. The mere taking in the public waters was trespass. (Strong was the next year one of the Judges of the Court of Appeals.) In the case of Lowndes *vs.* Dickinson, 34 Barbour, p. 586, a similar case, ground marked by stakes and buoys, with a slightly different phase, the same principle was again affirmed.

Although we have no such cases decided in this State, there is in our legislation the strongest recognition of this right, to appropriate a special field or portion of what is common to all or many to individual use. By an Act of our General Assembly passed more than forty years ago (that is in 1842.) and embodied in General Statutes (Sections 1712-14,) it is made larceny "to take or steal from any oyster bed, sufficiently marked out, oysters there growing, lying or being, and a misdemeanor unlawfully to use any dredge or any net, instrument or engine whatsoever within the limits of any such oyster bed."

We can therefore insist that at the passage of the Act of 1876 the Coosaw Mining Company had a right to exclude all others from digging and mining where they had established themselves, and that they had done so is expressly asserted in the recital in the second section of that Act, thus, "And whereas the said Coosaw Mining Company have already *occupied* so much of the Coosaw River as lies opposite to and south of Chisolm's Island, whereon their works are located, and to the marshes thereof, and have expended large sums of money in establishing themselves thereon, with sufficient mining plant for mining and preparing for market the phosphate rock and phosphatic deposits of that part of the said Coosaw River." It thus appears that at the passage of the Act of 1876 the Coosaw Mining Company had already acquired *by occupation* an exclusive right to at least all that part of Coosaw River described in its recital in the second section for the whole period of the grant of 1870. Whether they had acquired a property in the phosphate rocks in the Coosaw River is immaterial; they had the right to dig there and had taken possession for that purpose, and they were entitled to exclude all others from digging phosphates in that portion of the River.

Gen. Conner's opinion tests the exclusive right by relying on the rule that a right to mine gives no absolute property in the mineral while it remains *in situ*. This does not seem to be the proper test. The right to mine, in a particular lo-

cality, is in itself a property to be protected by the law. Thus phosphates are treated as property in the legislation of this State. In the General Statutes, at p. p. 27 and 28, Chap. V., "Of the Public Property," phosphate deposits form a conspicuous part of the whole chapter, and sections 65 to 69 are devoted to provisions for their protection and management. Take the case of a right to gather turpentine from a designated tract of our pine lands. Such a right would give no property in the soil, or in the trees, or in the sap of the trees.

No question is made as to the Attorney General's opinion that the grant of 1870 was not exclusive as to all the phosphates in all the rivers of the State. That is conceded, for that would have prevented the State from making any other grant, however long the grantees neglected to mine; but our position is that wherever these grantees located themselves permanently, with sufficient machinery and mining plant to develop any ascertained deposit of phosphate rock or phosphatic deposit, they would by such occupation acquire an exclusive right to mine that portion of any navigable stream in the State.

The justice of such a claim by the Coosaw Company is certainly countenanced, if not positively recognized, by the 22d sec. of the Act of 1878, (16 Stat., 622,) which enacts "That in case any company hereby incorporated, to whom exclusive territorial rights have not been granted, shall discover and begin to mine any bed or beds of phosphate rocks and phosphatic deposits in any of the navigable streams and waters of this State, from which phosphate rock and phosphatic deposits have not been previously mined, such company shall have the exclusive right to dig, mine and remove such phosphate rock and phosphatic deposits from the bed or beds so discovered and mined: *Provided*, That such bed or beds shall not cover an area exceeding fifteen miles," &c.

Gen. Conner's opinion recognizes the obligation of the State to individual grantees, who have spent labor and money in availing themselves of the grant or license, as a contract, and our claim to exclusive right is based upon

this. For we were developing the property of the State without any expense to it, and paying to it a very considerable portion of any profit which could be made, and no phosphates had ever been raised from Coosaw River before the Coosaw Company raised them.

Another point made in Gen. Conner's opinion is upon the Title of the Act of 1876, which he says cannot be construed as extending the period granted by the Act of 1870, because the Constitution of the State prescribes that every Act "shall relate to but one subject, and that shall be expressed in the title," and that purpose is not expressed in this title. This seems to me a violent extension of this Constitutional provision, and would equally exclude what he calls the substitution of an exclusive right to mine in place of a general right. The Act does not go beyond the subject indicated in the Title. The Title states the purpose of the Act to be threefold, in reference to the one subject of the Act.

The subject of the Act was the settlement definitely of "the periods at which returns shall be made of phosphate rocks and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina, and the royalty shall be paid thereon, and *also* to fix the terms on which this Act may be accepted by the parties named therein." The subject was but one, the property of the State in the phosphate rocks and phosphatic deposits in the beds of the navigable streams and waters of the State; the relation of the grantees of the right to mine them to the State, and the manner of settling for royalty, were necessary incidents.

Many particulars had to be considered and embraced in such a settlement, but all such particulars would be strictly parts of the one subject, which could not otherwise be definitely settled. And when the subject was expressed in the Title, that was all that could be done, or was necessary to be done. Otherwise there must have been several Acts, one for making returns, one for paying royalty, possibly another for giving bonds and so forth, and therefore there could not

have been any definite settlement of the subject matter in any one Act. Surely the Constitution should not be so construed.

This is just what is said by Chief Justice Simpson in the opinion sustaining the judgment of the Supreme Court in the case of Coleman vs. Chester, 18 S. C., p. 464 at p. 466— * * * "lest a too strict construction" (of the Constitutional clause) "might defeat its very object and purpose by clogging legislation and loading down our Statute Books with numberless separate Acts wholly unnecessary to the end designed. By such a constitution few matters could become the subject of legislation in a single Act. Every qualification and condition imposed would have to be embraced in a separate Act, which would make it difficult and tedious to ascertain the Statute law in any matter, as all the Acts scattered through the Statutes would have to be examined before any conclusion could be reached."

Since this decision of our Supreme Court, the Supreme Court of the United States have considered the same question, upon a similar objection to an Act of the State of New Jersey, under its constitution, which provides "To avoid improper influences, which may result from intermixing in one and the same Act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." The case is *Montclair vs. Ramsdell*, 107 U. S. p 147. It was held "That this provision does not require the title of an Act to set forth a detailed statement, or an index or abstract of its contents; nor does it prevent uniting in the same Act numerous provisions having one general object fairly indicated by its title." Harlan J, at p. 155, after citing several New Jersey decisions, says "it is not intended by the constitution of New Jersey that the title to an Act should embody a detailed statement, nor be an index or abstract of its contents. The one general object—the creation of an independent municipality—being expressed in the title, the Act in question properly embraced all the means or instrumentalities to be employed in accomplishing the object."

But if the returns and payment of royalty were necessary parts of a system in regard to the phosphates, to make them available to the State, the other particular of how those who already held grants should be induced to come into the arrangements of the new system, was only a part of the one scheme contemplated in reference to the one subject, the phosphate property, which was expected to yield a large income to the State. The argument from the title of the Act, we think, is thus fully answered.

We have next to consider the rule of construction applied by the Attorney General. that is the rule for private Acts, which we deny to have any application to this Act. The opinion sets out with an assumption or statement thus, "when the Coosaw Company applied for the passage of the Act of 1876"—but it does not offer any proof of the material fact, that the Coosaw Company ever did apply for the passage of this Act or any other like it; a fact certainly to be established, if it is to be the basis upon which to build a construction, very different from the very simple and plain language of the Act.

The authority cited, *Dubuque Railroad* case, does not excuse this omission, for in that case Catron J., delivering the opinion of the Court, goes into a history of the Statute construed, to prove that it was to be so construed, that is as a private Act, a grant or donation for the benefit of Iowa, and refers to the proceedings in the progress of its enactment, and the action of Congress, in order to establish this to be the proper rule for its construction. And in this history not only established the rule for construction, but also the propriety and necessity of the conclusion.

We have shown that it was not the Coosaw Company, but the Comptroller General, the highest fiscal officer of the State, who applied for this legislation. The rule therefore cannot be applicable to the Act of 1876, or authorize the construction given by the opinion of the Attorney General The Act, neither in its title, nor its preamble, nor in its recitals, gives the least hint that it was passed at the instance or for the benefit of the Coosaw Company, but seems

plainly to evince a doubt whether it would bring that Company to accept its terms, and recognizes their right to refuse and defeat the scheme proposed.

Then again the rule relied on cannot be applied because the Act of 1876 was in no sense a private Act or grant, but a public Act to regulate all grants of a certain class, and fix the law as to a very valuable property of the State scattered throughout all its navigable streams and waters. The title of the Act seems to settle this because it is declared to be "An Act to settle definitely the periods at which returns shall be made of phosphate rocks and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina, and the royalty shall be paid thereon." It was to extend to the whole State and govern every person natural or artificial having right to dig and mine the phosphates of the State. And the last Section repeals all Acts and parts of Acts inconsistent with it. The subject of this Act, the phosphates in the navigable streams of the State as the property of the State, had been the subject of general legislation before this Act. In 1872 an Act was passed (approved March 6th), 15 Stat. 104, entitled "an Act to provide for the appointment of an inspector of phosphates and to declare his duties." And since the passage of this Act of 1876, another public Act or General Statute was passed in 1878, (16 Stat. 615,) entitled "an Act to protect the rights and interests of the State in the phosphate rocks and phosphatic deposits in the navigable streams and waters of the State," which seems clearly to recognize the Act of 1876 as part of a system. After incorporating a number of companies, and giving them the right to mine phosphates, *Section 6* requires them each to give bonds, conditioned for the payment of the royalty, in accordance with an Act of the General Assembly, entitled an Act to settle definitely the periods &c., reciting the whole title, approved 28th March, 1876, which bond and the sureties thereof shall be subject to the approval now required by law for the bonds of State officers, and the company upon so

doing shall thereupon become and be subject to all the provisions of the said Act approved March 28th, 1876.

Again in *Section 22*, there is a proviso, that nothing shall be so construed as to give to any such company the right to dig and mine in any streams or parts of streams or waters to which exclusive rights have otherwise been granted. And yet again in *Section 27*, the last section, we read "that it is hereby declared that any and every company digging and mining under the provisions of the Act approved 28th March, 1876, and of this Act, shall be considered and regarded as having punctually paid the royalty as therein provided, if the same be actually paid to the State Treasurer within ten days from the end of any quarter when the same became due"—thus distinctly recognizing the Act of 1876 as part of a general system, and a public law, and precluding the supposition that it should be held and construed only as a private Act.

Then follows a proviso in these words, "provided that nothing herein contained shall be construed to excuse or justify any breach of the provision of the said Act, or in any way to confirm any rights alleged or claimed to have been granted." The best explanation of this proviso is to be found in the Attorney General's opinion, in which he states what companies claimed the benefits of the provisions of the Act, but that several of them had not complied with and entitled themselves to those provisions, and that only two of the companies had complied, namely, the Coosaw and the Oak Point Mines Companies; and that the others, the Boatman's, Ladies Island, Palmetto, South Carolina, and Marine and River had not complied. Of course this proviso was applicable to these last named companies, and precluded them from any of the benefits they claimed.

It should also be observed, that this proviso shows a determination in the Legislature to enforce any forfeiture that may have been incurred even by those companies that had accepted the terms of the Act, as it declares that nothing in that Act of 1878 shall be construed to excuse or justify any breach of the provisions of said Act. And this

confirms our interpretation of the Act of 1876, that it was intended to change the tenure from an absolute right for a term of years to a right to be enjoyed only from month to month and quarter to quarter upon the performance of the conditions required to be performed, and also an intention to enforce the forfeiture if the conditions had not been performed; but for the future allowed ten days grace for the payment of royalty to all who had right to mine.

At all events it seems to be clearly recognized as a public Act, and cannot be construed as a private Act, upon which supposition Gen'l Conner's opinion rests. For he says this would violate "the settled rule of construction applicable to Statutes containing public grants. The rule is uniform that 'nothing passed but what is contained in clear and explicit language,' (Dubuque R. R. Co. vs. Litchfield, 23 How. 66.) 'The reason of the rule is obvious. Parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently clear and explicit to pass every thing that is intended to be passed, it is their own fault, while on the other hand such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking by ingenious interpretation and insinuation that which cannot be obtained by plain and express terms.' Or as said by Chief Justice Marshall in Providence Bank case, 4 Peters, 561, 'when it is alleged that the State has surrendered for all time a valuable privilege or power, the community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear, nor is the doctrine limited to the taxing power. Whenever any power of the State is said to be surrendered or terminated, whether it be the taxing power or any other affecting the public interest, the same principle applies and the rule of construction must be the same.' "

It should be observed, that the statement, that in Statutes containing public grants the rule is uniform that nothing passes but what is contained in clear and explicit

language, is rather broad, and is quoted from a case involving nothing but the location and boundaries of a Congressional grant, and the authority quoted and relied upon by the Court was a judgment of Lord Ellenborough, in which he is reported to have said: "If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interests of the public, and against that which is more favorable to the Company, because the Company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended." These decisions are controlled by three considerations: First, that the party claiming a favorable or liberal construction in his favor has been the petitioner or applicant for the Statute; Second, that he is supposed to have drawn the Statute to express all that he asked for; and Third, that what he claims would work a surrender of some sovereign power or impose a burden upon the public.

None of these considerations can be applied to control the construction of this Act of 1876. There is not the least evidence that the Coosaw Mining Company made any application to the Legislature for the passage of this Act, but the evidence positively contradicts such a conclusion. The Comptroller General instituted the false claim upon the Company, and then invoked the Legislature to do something to sustain his views, which the Legislature not only refused to do, but actually adopted the construction of the Company and declared it to be the law. Then there is nothing in evidence or in the Act to suggest the probability that it was drawn by the Coosaw Company. In fact, the Act, so far from exhibiting any indication of having been drawn by the Company, plainly declares that it was not certain that the Company would acquiesce in its terms, and offered the Act for its acceptance or rejection; and the only inducement held out to the Company was contained in the provision, "that the Company, on accepting the terms of this Act within ten days from the passage

thereof, shall thenceforth have the exclusive right to occupy and dig, mine and remove phosphate rocks and phosphatic deposits from all that part of the said Coosaw River above mentioned, so long as and no longer than they shall make true and faithful returns of the number of tons thereof they shall so dig, mine and remove and ship or otherwise send to market, and punctually pay the royalty thereon, as provided in the first section of this Act."

Now, the first section changed the time of payment of royalty from annual to quarterly payments, which would average, after the passage of the Act, nearly $2,000 of annual interest lost to the Company, and probably saved to the State. Besides this, in order to accept the terms of the Act, the Company was required to pay within ten days after its passage all the royalty accrued up to the first of March, and did pay on the 5th April, 1876, within that time, $12,751, which, under its original grant, was not due until the first October of that year, that is, five or six months before it was due, making a loss of interest to the Company on this item or payment alone about $400. These terms were certainly all in favor of the State, and against the interest of the Company, and the Act plainly declares that they could not be enforced or imposed upon the Company but with its consent, and the only benefit offered to the Company was the exclusive right in the terms of the clause quoted above. This was clearly a contract proposed by the State to the Company, which it might or might not accept.

Clearly, as between ordinary contractors, he who accepts has the right to put the most favorable construction for himself the offer admits of. If there be ambiguity, that is the fault of him who offers and fixes the terms for acceptance, not the party who is induced to accept upon a construction he may fairly put upon it.

Looking at this offer from the Company's side, unless it offered a right to mine beyond the term already granted to it, and as long as phosphates could be obtained, it offered nothing but what they might have claimed under the law as it stood before, as we have shown. Then there is no am-

biguity in the language; that plainly offers to the Company an exclusive right to a certain portion of Coosaw River, *for so long as, and no longer than*, the Company should perform its part of the contract. The effort is to control those words and limit them to a period nowhere mentioned or alluded to in this Act of 1876. But, as was said by Justice Swayne, in *Butz vs. City of Muscatine, 8 Wall., p. 580*: "We cannot interpolate a restriction by importing it from another Act which has no necessary relation to the class of cases for which the Code intended to provide."

If what is claimed for the Company were a perpetuity in the exercise of some sovereign right, thus abridging the power of the State in the exercise of such sovereign right, as giving a power to levy toll, or to exempt from taxation, there might be reason and justice in applying the rule relied on by the Attorney General.

The rule, it is admitted, is derived from the Common Law as to royal and parliamentary grants; and Judge Story, in his dissenting opinion in the Charles River Bridge case, 11 Peters, 596–7, after a review of the English authorities, says: "But what I repeat as most material to be stated is, that all this doctrine in relation to the King's prerogative of having a construction in his own favor is exclusively confined to cases of mere *donation*, flowing from the bounty of the Crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorably to the grantee."

Then again, what makes our claim to this construction still stronger, is the subject matter of the legislation and legislative grant. The State owned a property which it could not utilize. The phosphates lay in the beds of its navigable streams and waters, and, however valuable, the State had no machinery, or mode of getting at them, and making them valuable. They had granted the right to mine, and had begun to derive a profit from the royalty exacted. The income from this property was $67,969 in 1875; $81,912 in 1876; and $126,569 in 1877 the year after

the passage of this Act, of which the Coosaw Company paid more than half ($73,202,) according to the tables annexed to the Attorney General's report and opinion,

Now, to say that a State, when dealing with its property, does not contract as any other proprietor contracting about his property, is to impose an impediment or restraint upon its dealings, so as must seriously affect its ability to manage its property. It is a question of the disposition of property, and not a question about granting sovereign rights which its holds for the benefit of all its citizens.

As I am unwilling to overlook any argument offered in Gen'l Conner's opinion, I must notice that which he rests upon the rule that repeals are never to be implied, and that the construction we contend for would repeal the acts granting to the "Boatmans" and "South Carolina Phosphate" Companies licenses for thirty years. First then I have to say, the last section of the Act of 1876, does repeal all Acts and parts of Acts inconsistent with the Act of 1876? and they are thereby declared for the purposes of this Act to be repealed. The only question is then, are the Acts granting licenses to these companies or any parts of them inconsistent with the Act of 1876. Certainly the period for paying royalty fixed by those Acts is repealed, and expressly not impliedly repealed. This supposes the grant or license to continue, not to cease. In fact, it implies a confirmation of the grant or license, not a repeal. And as to the period of thirty years, there was no change in that, because the report recognizes that those two companies had never brought themselves within the provisions of the Act of 1876, and therefore had no exclusive rights—but it cannot but be observed that the fact, that their charters were for thirty years from 1871 and 1874, while the license to the Coosaw and Oak Point Mining Companies was in 1870 but for twenty-one years, does seem to suggest a reason why the license to the Coosaw and Oak Point Companies should be extended upon their compliance with conditions which they could not be compelled to observe: as otherwise, the "South Carolina" and "Boatmans"

Companies could have entered upon their exclusive territory and enjoyed it for ten and thirteen years after the licenses of the Coosaw and Oak Point Companies had expired. An extension of their licenses beyond the thirty years of the other two seems to have been natural and eminently proper.

In conclusion, I can say, if I have presented sufficient reasons to claim a natural construction of this Act, such as the Coosaw and Oak Point Mines Companies might reasonably have put upon it when they accepted the Act, the Attorney General's opinion admits this to be a possible construction. For he says, "There is enough in the very skilful wording of the Act to raise the doubt and indicate the probability, if not certainty, of such claim being made hereafter when the terms for which the licenses were granted shall have expired." This claim he sees may be made by those who accepted the terms of the Act, namely: The Coosaw Company and Oak Point Mines Company. If either is entitled to make this claim, both are, and there is no hint that the Oak Point Mines Company made any application for the passage of the Act. And if that company was embraced in the provisions of the Act, how can it be said to have been for the private advantage of the Coosaw Company?

EDWARD McCRADY.

Charleston, S. C., 7th October, 1884.

(over)

NOTE TO BE ANNEXED TO MY OPINION.

When the period for which the original grant of 1870 was made, arrives, that is, in 1891, it will be proper to notice what has not been alluded to in my opinion, that is, the very last paragraph of Gen. Conner's opinion upon this point. After saying, "Whether any or all of the Companies claim such perpetual license, I am not advised, nor have I felt myself authorized to inquire, as the Legislature alone is competent to deal with the subject. My duty is performed in calling attention to the terms of the Act [that is, of 1876] and the questions which may arise under it. There is enough in the very skilful wording of the Act to raise the doubt, and indicate the probability, if not certainty, of such claim being made hereafter, when the terms for which the licenses were granted shall have expired." He then closes with this: "It is scarcely prudent to leave the question an open one until then; *and unless the State acquiesces in the doctrine that a perpetual license is granted to all Companies which comply with the Act of 1876*, it will be for the Legislature to adopt such measures as in its judgment may be *necessary* for the protection of the rights and interests of the State."

Although in the course of my opinion, I have shown how often the Legislature referred to the Act of 1876, and recognized it as a part of a system, I did not allude to a special recognition of the exclusive right of the Coosaw Mining Company made in the Act of 1878, at the same session to which the Attorney General made his report. In Section 12 of that Act, incorporating the Farmers' Phosphate Company, it makes this exception, "Excepting all that part of Coosaw River which lies opposite to and South of Chisolm's Island, whereon the works of the Coosaw Mining Company are located, and which was exclusively granted to the said Coosaw Mining Company by Act of the General Assembly, No. 199, approved March 28th, 1876."

Up to this time, although so distinctly noticing this exclusive right of the Coosaw Mining Company, the

Legislature has in no manner indicated any approval of Gen. Conner's conclusion and suggestion, nor has given any expression whatever which can show that they did not acquiesce in the doctrine [rather construction] that the Act of 1876 did give the exclusive right perpetually or indefinitely, upon performance of certain conditions. The only action which the Legislature could have taken or directed, was some judicial proceeding. Nothing has been done or directed to be done. The Coosaw Company could do nothing, as they could not institute any proceedings in a Court against the State, and have not yet been interfered with by any of its officers. And it seems plain that after this warning of the Attorney General, all the Companies which did accept and comply with the terms of the Act of 1876, had the right to construe this inaction as an acquiescence in the construction that they had an indefinite extension of their exclusive right upon conditions. As it would be most unjust to these Companies, and to those that dealt with them, and especially those who afterwards became partners with them, to wait until the term of the original grant had expired, before taking proper measures to establish their right to cut them off at that time, should mining operations still continue to be profitable.

EDWARD McCRADY,

Senior Solicitor of the Coosaw Mining Company.

MAR 14 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1448.

THE COOSAW MINING COMPANY, APPELLANT,

vs.

THE STATE OF SOUTH CAROLINA EX RELATIONE B. R. TILMAN ET AL., APPELLEES.

Argument of Appellants in Reply.

EDWARD McCRADY, JR.,
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Counsel for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Argument of Appellants in Reply.

AS TO CONSTITUTIONALITY OF ACT OF 1876.

The appellees maintain that this Act is defective, in that it relates to more than one subject, and that those subjects are not clearly set out in the title.

This point is not raised in the exceptions. This question was argued by them in the Court below, but that Court refused to consider it or hear argument in reply. We therefore omitted to discuss it in our argument-in-chief, and only discuss it now in reply to the argument submitted by respondent.

The burden is upon them to make this objection clear, beyond all reasonable doubt, to the Court.

The appellants submit on the contrary that the Act re-

lates to but one subject matter, to wit: The management of its phosphate territory by the State. That this is the subject matter of the Act; that all the provisions of the Act relate to that subject, and provide for a general method under which the territory is to be worked; the time and manner in which the returns are to be made, and royalty paid; and the terms upon which those, whom the State desired to accept the Act, should be allowed to do so, and continue such mining operations.

That these terms consist of the exclusive right to occupy and possess certain defined territories, and already occupied by such parties with sufficient plant to mine therein, so long as they comply with the terms of the Act; that they are all matters germane to the subject, and clearly described in the title of the Act itself, which provides in so many words that it is "to fix the *terms* under which this Act may be accepted by the parties named therein."

Presumption in Favor of Constitutionality.

The Court always presumes an Act to be constitutional and valid until the contrary is clearly shown.

In Cooper vs. Tellfair, 4th Dallas, 14, the Supreme Court of the United States says:

"The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated."

In Township vs. Talcott, 19 Wall., 643, the Court says:

"It is said the Act is in conflict with the Constitution of the State.

"It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground, unless the repugnancy to the constitution be clear, and the conclusion that it exists inevitable. *Every doubt is to be resolved in support of the enactment.* The particular clause of the constitution must be specified *and the act admit of no reasonable construction in harmony with its meaning.* The judicial function involving such a result is one of delicacy, and to be exercised always with caution."

In Fletcher vs. Peck, 6th Cranch, 128, Chief Justice Marshall, pronouncing the opinion of the Court, says:

"The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its Acts to be considered as void. The opposition between the constitution and the law should be such that the Judge feels *a clear and strong conviction of their incompatibility with each other.*"

See also—

Pelzer vs. Campbell, 15 S. C., 593.
Ex parte Lynch, trustee, 16 S. C., 35.
R. R. Co. vs. Gibbes, 24 S. C.. 68.

Is the Title Defective?

Sections similar to the constitutional provisions of South Carolina, are found in the constitutions of most of the States; and they have been frequently before the Courts for their adjudication. The rule as laid down is uniform, to wit: that where the provisions of the Act are germane to the general subject of the Act, they are properly embraced in its title, and cannot be said to fall within the constitutional inhibition. We prefer to state the modification of the rule in the language of the Courts themselves, and unlike our friends will rely solely on the decisions of this Court and those of the Supreme Court of South Carolina.

In Woodson vs. Murdock, 22d Wallace, 373, where this objection was made, the Court says: "The Act has many details, but they all relate to one general subject."

In Jonesboro' City vs. The C. & St. L. R. R., 110th U. S., 199, the Court says:

"The title of the Act is 'An Act to amend the charter of the Cairo and St. Louis Railroad Company.' The contention is, that the legalization of an election previously held, and at which the people voted in favor of a subscription of stock to that company, and the granting of authority to issue bonds in payment of such subscription, is not a subject expressed by the title of the Act.

"In this view we do not concur, and our conclusion is justified by the later decisions of the Supreme Court of Illinois construing a similar provision in the State Constitution of 1870. It was held in Johnson vs. People, 83 Ill., 431, that the constitution '*does not require that the subject of the bill must be specifically and exactly expressed in the title;* hence we conclude that *any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required.*' People vs. Lowenthal, 93 Ill., 191."

In Louisiana vs. Pillsbery, 105th U. S., p. 16, the Court says:

"The question then arises, Was the Act of 1852 valid? Its invalidity is asserted, as stated above, on two grounds: the first of which is, that its object is not expressed in its title, as required by Article 118 of the Constitution of 1845. The title of the Act is, 'An Act to consolidate the city of New Orleans, and to provide for the government and administration of its affairs.' The article of the constitution declares that 'every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title.'

"A similar provision is found in several State Constitutions. Its object is to prevent the practice, common in all legislative bodies where no such provision exists, of embracing in the same bill *incongruous matters, having no relation to each other, or to the subject specified in the title*, by which measures are often adopted without attracting attention, which, if noticed, would have been resisted and defeated. It thus serves to prevent surprise in legislation. But it was not intended to forbid the union of several different provisions in the same bill, *if they are germane to the general subject indicated by its title.*

"So here, under the title of the Act in question, provisions might be enacted, not merely relating to the union of the different municipalities and the government of the city, *but to all the varied details* into which the general administration of its affairs might lead."

In School District vs. Hall, 113th U. S., p. 140, the Court says:

"The Constitution of Iowa provides that 'every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title.'

"We are not referred to any adjudication by the Supreme Court of Iowa which sustains the point here made. On the contrary, the principles announced in State vs. The County Judge, 2 Iowa, 281, show that the Act before us is not liable to the objection that its title embraces more than one subject. The object of the constitutional provision, that Court said, was to prevent *the union in the same Act of incongruous matter, and of objects having no connection, no relation*, and to prevent surprise in legislation, by having matter of *one nature* embraced in a bill whose title *expressed another*; but, that, it cannot be held with reason that each thought or step towards the accomplishment of an end or object should be embodied in a separate Act; that the unity of object is to be looked for in the ultimate end, and not in the details or steps leading to the end; and that *so long as they are of the same nature, and come legitimately under one general denomination* or object, the act is constitutional."

In Montclair vs. Ramsay, 107th U. S., p. 153:

"It is not intended to prohibit the uniting in one bill of *any number of provisions having one general object* fairly indicated by its title. The unity of the object must be sought in the end which the legislative Act proposes to accomplish. The degree of particularity which must be used in the title of an Act rests in legislative discretion, and is not defined by the constitution. There are many cases where the object might with great propriety be more specifically stated, yet the generality of the title will not be fatal to the Act, if by fair intendment it can be connected with it."

In Mahomet vs. Quackenbush, 117 U. S., p. 513, the Court says:

"The general purpose of these provisions is accomplished when a *law has but one general object, which is fairly indicated by its title.* To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate Act relating to that alone would not only be unreasonable, but would actually render legislation impossible."

In Carter County vs. Sinton, 120th U. S., 523, the Court held:

"The provision of the Constitution of Kentucky relied on in Art. II, page 37, is as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

"Undoubtedly the design of this provision was, as is said in Pennington vs. Woolfolk, 79 Ky., 20, to prevent the use of deceptive titles as a cover for vicious legislation, by enabling members of the General Assembly to form such opinion of the nature of a bill by merely hearing it read by its title;" but as early as 1859 the Court of Appeals said in Phillips vs. Covington & Cincinnati Bridge Company, 2 Met. (Ky.,) 219, 221: 'This prohibition should receive *a reasonable and not a technical construction;* and looking to the evil intended to be remedied, it should be applied to such Acts of the Legislature alone as are obviously within its spirit and meaning. None of the provisions of a statute should be regarded as unconstitutional where they all relate *directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in its title.*'"

See also Otoe vs. Baldwin, 110th U. S., page 16.
Read vs. Platsmouth, 107 U. S., 579.

The question has also been frequently presented to the Supreme Court of South Carolina, and its decisions have been uniform and on the same line as those quoted from the Supreme Court of the United States.

In the case of Coleman vs. Chester, 18th S. C., 467, the Court in considering an objection to the constitutionality of the act before it as being in violation of this provision of the constitution, and discussing the construction sought to be given to the constitution by which the Act would have been declared invalid, in whole or in part, says:

"By such a construction few matters could become the subject of legislation in a single Act. Every qualification *and condition imposed* would have to be embraced in a separate Act, which would make it difficult and tedious, to ascertain the statute law in any matter, as all the acts scattered through the statutes, would have to be examined before any conclusion could be reached."

In Connor vs. the Railroad Co., 23 S. C., page 435, the Act before the Court was entitled "An Act to incorporate the Green Pond, Walterboro' and Branchville Co." Besides the Railroad charter, the Act contained provisions authorizing the County of Colleton to subscribe, in county bonds, to the capital stock of the company under certain conditions, such as, petition for election, election, declaration of election, issuing of bonds and levying of taxes by the county, to pay the interest on the bonds so issued. The objection was made that the Act was in violation of the constitutional provision under consideration, but the Court says:

"Section 20, Article II, of the Constitution, with which the Act here in question is supposed to be inconsistent, reads as follows: 'Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.'

"As we have said in Charleston vs. Oliver (16 S. C., 56), upon the authority of Mr. Justice Cooley, 'there has been, and ought to be, a general disposition to give *a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction.*' Hence, when a question, under this clause of the constitution is presented for adjudication, *we are bound to take a liberal and enlarged view*, and, if practicable, bring the legislation which is assailed as unconstitutional, within the limits prescribed by the supreme law of the land.

"Now, looking at the Act in question in this spirit, we do not see how it conflicts with the provision of the constitution which has been quoted. The subject to which the Act relates is the Green Pond, Walterboro' and Branchville Railway Company, and that subject is undoubtedly expressed in the title, nor do we find that the Act relates to any other subject. As is usual with Acts bearing such a title, after constituting certain persons a body politic and corporate by the name which they have chosen, it goes on to declare what such corporation may do, and how it may obtain the means for effecting the desired purpose—by receiving subscriptions to its capital stock.

"The fact that it also provides that a certain corporation, which otherwise would not have the power to do so, may subscribe to the capital stock upon certain prescribed conditions, does not, it seems to us, bring that portion of the Act in conflict with the constitution. *No new subject is introduced into the Act*, but the subject which all the while engages the attention of the legislature is the railway, which necessarily includes any appropriate means for its construction. For, as is well said in San Antonio vs. Mehaffy

(96 U. S., 315), 'when an Act of the legislature expresses in its title the object of the Act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction that every law shall embrace but one object, and that shall be expressed in its title.'"

In Floyd vs. Perrin, 30th S. C., page 9, decided in 1888, the Act before the Court was entitled: "An Act to charter the Greenville and Port Royal R. R. Co."

Besides chartering this company, the Act, in certain sections, provided that any township situated along the line of road, which desired to subscribe to the road, should be thereby created a body politic and corporate. It then went on to provide that such township corporations, so created, should have the right to hold elections for subscriptions to the capital stock of the company, and to vote thereat on the question of such subscriptions, and if the same was carried to issue township bonds for the payment of these subscriptions, and providing for a levy of a tax on the township to pay them. The objection was made that the Act was unconstitutional but the Court sustained the Act and said:

"This Court has several times considered and discussed Section 20, Article II, supra, notably in the cases of Charleston vs. Oliver, 16 S. C., 47; Coleman vs. Chester, 18 Id., 464; Woodside vs. McDaniel, 19 Id., 116; and Connor vs. Railroad Company, 23 Id., 427. In some of these cases, the principle under which the section should be construed and applied was announced. In Charleston vs. Oliver, while holding the Act under review unconstitutional, because, in the judgment of the Court, it was in violation of the section, the Court said: 'We think there has been and ought to be a general disposition *to give a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction*' (Cool. Const. Lim. 146); and we fully agree with the Supreme Court of the United States, where (San Antonio vs. Mehaffy, 96 U. S., 315, adopting the language of the Texas Court in San Antonio vs. Lane, 32 Texas, 405,) it holds that 'when an Act of the legislature expresses in its title the object of the Act, the title embraces and expresses *any lawful means to achieve the object*, thus fulfilling the constitutional injunction that every law shall embrace but one subject, and that shall be expressed in its title.'

"In Coleman vs. Chester, supra, the Court said: 'This section, no doubt, contains a wise provision, and, if properly observed, would tend greatly to prevent confusion and doubt as to the exact meaning and intent

of legislative enactments, and to this end it should be enforced by the Court in all proper cases, due care being exercised lest *a too strict construction* might defeat its very object and purpose by *clogging legislation and loading down our statute books with numberless separate acts*, and wholly unnecessary to the end,' etc.

"These two cases and others show the spirit in which this Court has been disposed to consider this section. And under the influence of this spirit, in Conner vs. Railroad Company, supra, where in an Act to incorporate the Green Pond, Walterboro' and Branchville Railroad Company, power was conferred upon the county commissioners to issue bonds in subscription to the capital stock of this railway, the Court said: 'As we have said in Charleston vs. Oliver, 16 S. C., 561, upon the authority of Mr. Justice Cooley, 'There has been and ought to be a general disposition to give a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction. Hence, when a question under this clause of the constitution is presented for adjudication, *we are bound to take a liberal and enlarged view*, and, if practicable, bring the legislation which is assailed as unconstitutional within the limits prescribed by the supreme law of the land.'

"And in this case the section assailed was held constitutional ON THE GROUND THAT IT CONTRIBUTED TO THE OBJECT EXPRESSED IN THE TITLE, and could be properly regarded as a lawful means to achieve that object, to wit, the incorporation and construction of the Green Pond, Walterboro' and Branchville Railroad Company."

See also Morton, Bliss & Co. vs. Comptroller General, 4th S. C., 442.
Pelzer vs. Campbell, 15th S. C., 593.
The Railroad vs. Gibbes, 24th S. C., 69.
Uteley vs. Cavender, 31st S. C., 289.

These authorities show conclusively the spirit in which the Supreme Courts of the United States and of the State of South Carolina have considered this section of the constitution. In fact in all the cases on this point, which have come before the Supreme Court of this State on this subject, and there are very many, the Court has but once, and that many years ago, held the Act under review unconstitutional.

Looking at the Act of 1876, in the light of these authorities, it is clear that no objection can be made to it or any

part of it on the ground that it is in violation of this constitutional provision.

To paraphrase the language of the Supreme Court of South Carolina in Conner vs. The R. R. Co, the subject to which this Act relates is the development of the phosphate territory of the State, by certain parties mining under contracts with the State, and that subject is undoubtedly expressed in the title. Nor do we find that the Act relates to any other subject. The fact that it also provides the terms upon which the persons so mining shall be allowed to accept the provisions of the Act, and to continue their mining operations under its terms, which they would otherwise not have the power to do, does not, it seems to us, bring that portion of the Act in conflict with the constitution. No new subject is introduced into the Act, but the subject, which all the while engages the attention of the legislature, is the proper mining of the phosphate territory of the State, and the securing to the State of its systematic development, and proper returns and royalty therefrom, which necessarily includes any proper means for attaining that end.

We do not think that any words of ours can more fully and properly state the question before the Court than these words paraphrased from the language of the Supreme Court itself.

Complainants say that no one reading the title of the Act would suppose that it contained such important provisions as the grant of an exclusive perpetual right to mine in the State's territory. Why not?

The title sets out that it is to settle definitely the periods at which returns shall be made of phosphate mined in the beds of the navigable streams of the State and the royalty shall be paid thereon.

To what does this call attention? That the Act is dealing with the whole subject of the phosphate mines of the

State, and the returns and royalty from the same. That the Act is intended to *settle* some dispute, and to settle such dispute definitely.

In our view, this title would by itself be sufficient for all the provisions of the Act. It shows that the subject matter of the Act is the settlement of some difference between the State and the miners, and the necessary inference would be that in such a *settlement* there must be terms offered and given to each side. This is the essential idea of any settlement. And every one was notified by this much of the title to examine the Act carefully, to see in what the settlement consisted, and what were the terms of the settlement as between the miners and the State.

But the title does more. It states this exactly. It says: "Also *to fix the terms* on which this Act may be accepted by the parties therein named."

Can there be need of a wider title? Every one is notified that the Act is to settle differences, and in so doing to fix the terms upon which the miners, one of the parties thereto, may accept the Act. Can we think of a title which more properly calls upon all interested to examine the Act to see what terms the State was fixing with phosphate miners who chose to accept the settlement proposed in the Act.

But our friends insist that the title is bad because it creates contracts with a number of companies. (Argument, p. 47, fol. 186.)

This argument is refuted by referring to the Act of 1878, cited and relied upon by them. Its title is:

"An Act to protect the rights and interests of the State in the phosphate rocks and phosphatic deposits in the navigable streams and waters of the State."

Yet this Act incorporates no less than fifteen companies, and grants to each of them exclusive rights in defined limits, and its constitutionality has never been questioned.

So with the Act of 1890, the very Act under which this suit is brought. Its title is:

"An Act to create a board of phosphate commissioners, defining its purposes and duties."

Yet this Act goes on to create penal offenses and to impose forfeitures on persons mining, but our friends do not question its constitutionality.

Purpose and Effect of the Title.

But we submit that under the decisions of this Court and of the Supreme Court of South Carolina the title of an Act is never resorted to to aid construction unless the meaning is doubtful, and even then is of little weight.

In Hadden vs. Collector, 5 Wall., p. 110, this Court says:

"*The title of an Act furnishes little aid in the construction of its provisions.* Originally in the English courts the title was held to be no part of the Act; 'no more,' says Lord Holt, 'than the title of a book is part of the book.' It was generally framed by the clerk of the House of Parliament where the Act originated, and was intended only as a means of convenient reference. At the present day the title constitutes a part of the Act, but it is still considered as only a formal part. It cannot be used to extend or restrain any positive provisions contained in the body of the Act. It is only when the meaning of these is doubtful that resort may be had to the title, *and even then it has little weight.* It is seldom the subject of special consideration by the legislature."

And in a very late case, the State vs. Young (30 S. C., 410), the Supreme Court of South Carolina says:

"But it is earnestly insisted that, if there was no implied repeal here, there was an indirect repeal, based on the doctrine that the repeal of an Act necessarily carries with it all 'amendments' made to said Act, and that, therefore, the Act of 1807 being, as stated in its title, an 'amendment' of the Act of 1768, fell with the latter Act when it was repealed. We know of no inexorable rule of law which peremptorily requires that every Act which is entitled as 'an amendment' to a former Act must, therefore, be carried back and 'engrafted' upon that Act so as to become part and parcel of it for all purposes.

"*It is well settled that the title is no part of the Act—'there is nothing in a name.'* It seems to have been the practice formerly to encumber the titles of Acts by repeating fully the former titles of former Acts upon the same subject. The question must always be one of intention, to be reached by considering the character and objects of the Acts. As stated by Mr. Endlich, section 294: 'But even where the amendment merges portions of the original Act in the new provisions, so that from the time of the amendment the whole force of the enactment as to transactions subsequent to it rests upon it, the old Act retaining no vitality distinct from the new one, it may be referred to as controlling past transactions; and even an amendment of an Act, "so as to read" in a prescribed way, has no retroactive force, but is to be understood as enacted when the amendment takes effect.'"

We would also call the attention of the Court to the fact that this Act has remained on the statute books of South Carolina unchallenged *for over seventeen years.* That it has been repeatedly recognized in subsequent legislation as an Act bearing upon the general subject of the phosphate mines and territory of the State. That the defendants have been continuously acting under it and paying large sums into the treasury of the State. That whilst this question has been mooted, it has never before been objected to, either in the legislature or in the Courts; and, therefore, the State, by its own acquiescence, waived any doubt which might possibly have existed on this subject in favor of the constitutionality of the Act, and ratified it.

TITLE DOES NOT CONTAIN WORD "GRANT."

Our friends maintain (fol. 37, p. 10) that because the title to the Act of 1876 does not contain the word "grant," therefore no grant was intended by the legislature, and in support they cite the titles of certain acts which do contain it.

But they carefully omit the Act of 1878, the most general and comprehensive in the series, under which grants,—*exclusive grants,*—were made to more than fifteen different companies, the title to which is as follows:

"An Act to protect the rights and interests of the State in the phosphate rocks and phosphatic deposits in the navigable streams and waters of the State."

If, therefore, their position is correct, none of the large companies created by that Act had any rights at all.

But the legislature of South Carolina clearly understood the Act of 1876 as containing a "grant," for in this very act of 1878, section 12, with General Conner's opinion before them (see Appendix to Argument-in-Chief, p. 116, fol. 460), they describe and allude to the Coosaw territory as "*exclusively granted* to the Coosaw Company" by the act of 1876.

THE PACIFIC GUANO CO. CASE.

Our friends rely so fully, we might almost say so exclusively, on this decision (22 S. C., pp. 83–86) that we deem it proper to correct some errors in reference to it in their argument.

At fol. 66, p. 17, they state that the grants there construed were those under which the Pacific Guano Co. and their grantors had been in possession for years, purchasing upon the faith and in belief of their title thereunder. This is not so.

The grant construed was the 11th section of the Act of 1878, granting to the Oak Point Mines Co., who were not before the Court, the naked right "to dig, mine, and remove" phosphates. (See their own argument, p. 19, fol. 73, and opinion of the Court.)

Again, fols. 72–75, pp. 19, 20, they quote this case and the Bradley case as decisions on acts containing the same words as the Act of 1876. We have already shown that this is error, and an examination of the wording of the Acts of 1870, 1876, and 1878 will show that they are *not* the same.

Again, fol. 106, p. 27, and fol. 117, p. 30, it is asserted that it was argued in the Pacific case that the grant was a mere tenancy at will, and void for want of mutuality. This is error. No such argument was made, and an inspection of the case as reported will show that no such decision was rendered.

Again, fol. 150, p. 38, it is again asserted that the Court held that words such as are in the Acts of 1870 and 1876 carry only a mere license to dig, a revocable one, and that this was affirmed in State vs. Pinckney, and Port Royal vs. Hagood. Here are two errors:

First. The Court never held that such words as are in the Act of 1876 constituted a mere license, or even that the license under the Act of 1878 was revocable. Nor was this ruled in the Bradley case, decided before the Act of 1876 was passed.

Second. Such a ruling was *not* affirmed in the cases cited.

THE BRADLEY CASE.

At fol. 7, p. 3, our friends would seem to imply that the grantees under the Act of 1870, "including the Coosaw Company," filed this bill. This is error. The record shows that it was filed by one Bradley, and that the Coosaw Company was not a party to the suit.

Besides this, the Bradley case failed to make the very allegation of fact upon which the Coosaw Company relied, to wit: that the company was in the lawful actual occupation, with sufficient plant, of certain territory, and therefore was entitled to and had the exclusive occupation of the same, as no two could lawfully occupy the same territory at the same time.

Again, at fol. 72, p. 19, they cite this case as construing

the words contained in the Act of 1876. As we have already shown, they are essentially different from the words before the Court.

CONNER'S REPORT NOTICE TO COOSAW COMPANY.

Our friends maintain at fol. 120, p. 31, that the State gave notice to the Coosaw Company that the Act of 1876 conferred only exclusive rights for the balance of the period of 21 years and would be so construed by the State, and to sustain this position refer to General Conner's report.

So far from this being so, by reference to this report (Record, p. 87, fol. 138) it will be seen that General Conner distinctly notified the legislature that—

"It is scarcely prudent to leave the question open until then, and *unless the State acquiesces in the doctrine that a perpetual license is granted to all companies which comply with the Act of* 1876, it will be for the legislature to adopt such measures as in its judgment may be necessary for the protection of the rights and interests of the State."

But the legislature did not adopt any such measures. On the contrary, by the Act of 1878, section 12, it expressly recognized the grant to the Coosaw Company under the Act of 1876. Was not the company, therefore, justified in assuming that the "*State acquiesced in the doctrine of a perpetual license?*"

Our friends, however, at fol. 146, p. 37, cite a clause from the Act of 1878, that "nothing herein contained shall be construed in any way to confirm any rights alleged or claimed to have been granted."

But this in no way expresses the objection of the State to "the doctrine of a perpetual license."

More than this, by reference to the Act of 1878, printed as an appendix to our argument-in-chief (fol. 478, p. 120), it will be seen that this is only an excerpt from a clause in

section 27, which refers to and extends the time for the payment of the quarterly royalty by those mining under that Act or the Act of 1876. The whole clause reads:

"*Provided*, That nothing herein contained shall be construed to excuse or justify any breach of the provisions of said Act or in any way," &c.

It must be borne in mind that General Conner, in his report to the legislature, called their attention to the fact that a number of companies claimed the benefits of the Act of 1876 who, in his opinion, were not legally entitled to them. (Record, pp. 83, 85.)

It was to meet these cases that this proviso was adopted, and to prevent such claims from being recognized or affirmed.

Mr. McCrady, Sr., in his opinion, p. 19, fully explains this.

And we submit, in addition, that as a stream cannot rise higher than its source, this proviso can only refer to the subject-matter of the section of which it forms a part—that is, to the payment of royalty at the times indicated—and its effect was not to waive any forfeiture which had then occurred.

COOSAW COMPANY SURRENDERED NOTHING UNDER ACT OF 1876.

Our friends (fol. 118, p. 30, and fol. 194, p. 49) assert that the Coosaw Company surrendered no right by accepting the terms of the Act of 1876; that by that Act they obtained the exclusive right to mine in part of Coosaw river, retaining their general right to mine elsewhere.

How can this be, when the Act of 1876 gives to the other companies the exclusive right to the territory they had occupied and which formed a very large part of the general territory? The Coosaw Company by accepting the Act recog-

nized the exclusive right of other companies, and thereby surrendered their general right.

And, as we have already shown, the legislature accepted the surrender, and by the Act of 1878 granted exclusive rights to other companies in the territory so ceded.

NO DAMAGE TO COOSAW COMPANY.

Our friends assert (fol. 122, p. 31) that the Coosaw Company will suffer no damage because of the repeal of their continuing grant, because their plant is either floating and can be moved away, or is on their own land and the State cannot get it, and also because they can continue to mine on the general-rights system.

We have already pointed out the disadvantages of this system, so forcibly portrayed by General Conner (Record, p. 89, fol. 142), and that it was because they were assured of a continued exclusive right that the Coosaw Company so largely increased its plant.

But more than this, our friends themselves go on to show that if the Act of 1876 stands the Coosaw Company is secure, not only in its tenure but in its royalty; but if repealed they are at the mercy of the State to impose the most ruinous royalty. Was there nothing—is there nothing,—in a grant which fixed the royalty absolutely, as long as conditions were fulfilled, to warrant a larger investment, than an annual license, revocable at pleasure, and where the State had the right to raise the royalty at will and without notice?

EDWARD MCCRADY, JR.,
AUGUSTINE T. SMYTHE,
Counsel for Appellants.

MAR 9 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

RECORD CASE NO. 14,922.

TERM NO. 1448.

THE COOSAW MINING COMPANY, APPELLANT, 1

vs.

THE STATE OF SOUTH CAROLINA, EX RELATIONE, B. R. TILLMAN, GOVERNOR, Y. J. POPE, ATTORNEY GENERAL, W. H. ELLERBE, COMPTROLLER GENERAL, GEORGE H. WALTER AND J. D. MONTGOMERY, CONSTITUTING THE BOARD OF PHOSPHATE COMMISSIONERS OF THE STATE OF SOUTH CAROLINA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. 2

Brief of Argument on behalf of the Appellee the State of South Carolina.

STATEMENT OF CASE.

In 1870, the General Assembly of South Carolina, passed an Act (passed over the Governor's veto March 1st, 1870,) "to grant to certain persons therein named, and their asso- 3
"ciates, the right to dig and mine in the beds of the navi-

"gable streams and waters of the State of South Carolina "for phosphate rocks and phosphatic deposits."

General Statutes, vol. 14, p. 381. (See copy at foot of this argument.)

This Act, granted to certain persons named in the Act the right to mine and remove the phosphate deposits in the beds of the navigable streams and waters within the jurisdiction of the State for the term of 21 years, but only on the express condition that the grantees should pay therefor to the State
4 on the 1st of October, in each year, one dollar on each and every ton mined and removed during the year.

The grantees were further required annually to file a bond conditioned to make full returns annually, or oftener as required, of the number of tons of phosphate rock mined and removed.

On the 15th March, 1870, (*Record p. 75, folio 116,*) the grantees under this Act entered into an agreement among themselves whereby it was agreed that certain of them, viz: George S. Brown, Robert Adger, David Jennings, Orsamus A. Bowen, Henry K. Silliman, and James B. Campbell should mine and remove phosphate rock from the bed of the Coosaw
5 River.

On the 2nd May, 1870, those of the grantees to whom by this agreement was given the right to dig and mine in Coosaw River formed for that purpose an unincorporated joint stock association, called the "Coosaw Mining Company" the present appellant.

The rest of the grantees under the Act of 1870, formed themselves into a corporation for the purpose of mining phosphate rock from the beds of the navigable streams of the State (excluding Coosaw River) under the corporate name of the Marine and River Phosphate Mining and Manufacturing Company.

6 By an Act approved 6th March, 1872, (see copy at foot of this argument) the provision in the Act of March 1st, 1870, requiring annual returns, was modified so as to require the returns of all rock mined to be made monthly and not annually, and this modification was obeyed and followed by the Coosaw Mining Company and the other grantees under the Act of 1870. (*Record p. 74, fol. 114.*)

Subsequently to the Act of 1st March, 1870, viz: by Act approved 9th March 1871, (Statutes at Large of S. C., vol. 14, p. 688) the General Assembly of South Carolina granted to parties different from those in the Act of 1870, viz: to the South Carolina Phosphate and Phosphatic River Mining
7 Company, the same right of mining in the beds of all the navigable streams.

Likewise by Act approved 29th January, 1874, (Statutes at Large of S. C., vol. 15, p. 530) the same right of mining was granted to persons different from those named in the two preceding Acts.

The grantees under the Act of 1870, including the Coosaw Mining Company, claiming that the right to mine given them by that Act was exclusive and infringed upon by the subsequent Acts, filed a bill in equity in the United States Circuit Court for the District of South Carolina to restrain the South Carolina Phosphate and Phosphatic River Mining Company 8
a grantee under the Act of 1871, from mining in the beds of the navigable streams of the State. The Court held that the grant of the right to mine, given by the Act of 1870, was not exclusive and dismissed the bill, holding that

"The grantees under the Act of March 1st, 1870, can claim nothing "as we said before which is not clearly granted by it. They cannot "take anything by implication. Nothing passes but what in explicit "language is given, and when the intention of the Legislature is doubt-"ful, the act must be construed against the grantees."

This case will be found in *Bradley vs. South Carolina Phosphate Co.* 1 Hughes 72. This decision was rendered in 1875. 9

In the Autumn of 1875, a conflict of opinion arose between the Coosaw Mining Company and the Comptroller General of the State of South Carolina. The Comptroller General claimed that under the Act of 1870, the Coosaw Mining Company was bound to pay royalty on the 1st of October in each year, for every ton of rock "dug, mined and removed" during the previous year. The Coosaw Mining Company insisted that under the terms of that Act, it was bound to pay only on rock, which after being dug, mined and removed, was actually shipped or exported away.

Such being the state of affairs; the State claiming the right granted by the Act of 1870 not to be exclusive, the grantees 10
under that Act including the Coosaw Company asserting that that grant was exclusive; the State claiming that the grantees were bound to pay royalty on every ton dug, mined or removed, and the Coosaw Mining Company insisting that they were only bound to pay on every ton dug, mined, removed and shipped or exported: the General Assembly of the State met.

The Coosaw Company laid before the General Assembly the opinion of their counsel to the effect that the Comptroller General was wrong in his construction, although

"The only difference to the grantees besides the inconvenience of "having to raise this amount before they have received it, is the interest 11
"from this time to first of October 1876."

(See opinion of Edward McCrady, *Printed Record p. 64, folio 96.*)

The General Assembly at that session passed the Act, (approved 28th March, 1876,) "to settle definitely the periods "at which returns shall be made of phosphate rocks and phos-"phatic deposits dug and mined in the beds of the navigable "streams and waters of the State of South Carolina, and the "royalty shall be paid thereon, and also, to fix the terms on "which this Act may be accepted by the parties named
12 "therein.

General Satutes of S. C., vol. 16, p. 198. (See copy at foot of this argument.)

This Act recites, that differences had arisen between the Coosaw Mining Company and the Comptroller General, as to the times and manner of making returns of rock mined, and paying the royalty thereon and enacts:

Sec. 1. That returns of rock mined, shall be made at the end of every month, and the royalty shall be paid at the end of every quarter upon the number of tons "dug, mined and "removed and shipped or otherwise sent to market."

Sec. 3. That the Coosaw Mining Company, on accepting
13 the terms of this Act, within ten days, "shall thenceforth "have the exclusive right to occupy and dig, mine and remove "phosphate rock and phosphatic deposits from all that part "of the said Coosaw River, above mentioned, so long as, and "no longer than they shall make true and faithful returns "of the numbers of tons thereof they shall so dig, mine and "remove, and ship or otherwise send to market, and punctu-"ally pay the royalty thereon, as provided in the first section "of this Act."

In June, 1877, the General Assembly referred it to the Attorney General, to enquire into the matter of the charters theretofore granted to phosphate companies in the State, with
14 a view to define and protect the rights and interests of the State therein, and the Attorney General reported to the next session of the Assembly, December, 1877, that the Coosaw Mining Company having acquired under the Act of 1870, a non-exclusive right to dig and mine for 21 years from the first of March, 1870, that this right was made by the Act of 1876 exclusive, but was not extended beyond the original charter period of 21 years and would expire on the first of March, 1891. (*Record pp. 85, 87 and folios 134, 140*)

In 1890, the General Assembly passed an Act, (approved 23d December, 1890), to "create a board of Phosphate Commissioners defining its purposes and duties."
15 Statutes at Large, vol. 20, p. 691. (See copy at foot hereof.)

This Act creates a Board of Phosphate Commissioners,

consisting of the Governor, Attorney General, Comptroller General and two citizens, to be selected by the Board, invests them with the entire charge of all the Phosphate territory in the State, including the Coosaw River Territory after 1st March, 1891, and in Section 11 provides, that if any one interfere with, or contests their right to the peaceable possession of the States' Phosphate Territory.

"Then and in that case, the said Board of Phosphate "Commissioners are hereby authorized, and in the name, "and on behalf of the State of South Carolina, to take such 16
"measures or proceedings as they may be advised are proper "to enjoin and terminate any such molestation, interference "or obstruction."

In March, 1891, the State of South Carolina, on relation of the Board of Phosphate Commissioners, filed its Complaint in the Court of Common Pleas for Beaufort County, against the Coosaw Mining Company, alleging that the Coosaw Mining Company claimed to be entitled, in perpetuity, to the bed of the Coosaw River, and interfered with and obstructed the State and its agents therein. That the Coosaw Mining Company's claim was based upon the Act of 1876, before mentioned, but that said claim was invalid, because the Act 17
of 1876 was null, in that it had not been passed constitutionally, and did not, by its terms, give any such perpetual right, and that the Coosaw Mining Company had failed to comply with its conditions.

Upon the filing of this complaint, the Judge of the Court of Common Pleas for Beaufort County at Chambers, issued a temporary restraining order, with a Rule to show cause, on the Coosaw Mining Company, why an injunction should not issue.

Thereafter, and before the hearing of the Rule, the Coosaw Mining Company filed a petition and bond for removal to the United States Circuit Court, in the Court of Common Pleas 18
for Beaufort County.

The rule having come on to be heard before the United States Circuit Court at Charleston a motion was at the same time made by the Complainants to remand for want of jurisdiction or if that be refused, then that the injunction be made permanent.

By consent the hearing as had upon the rule and the motions was taken as the final hearng on the merits. (*Record p. 104 to 166.*)

The Court below (the Chief Justice presiding with the District Judge, both filing separate and concurring opinions) decreed in favor of the State, and made the injunction 19
against the Coosaw Mining Company perpetual. From this

decree the present appeal is now taken by the Coosaw Mining Company.

The question before this Court on the merits is whether the words "*so long as and no longer than*," used in the third section of the Act of 1876 operate so as to grant to the Coosaw Mining Company a *perpetual* right to mine, or to grant only an *exclusive* right for the unexpired period of their original franchise of 21 years.

20 Upon the decision of that question depends as a result whether the State of South Carolina can ever demand and receive full market value for her valuable phosphate deposits, or shall forever be restricted to the arbitrary limit of $1.00 per ton.

ARGUMENT.

The controlling question is as to the construction of the Act of 1876. The contention of the appellant, the Coosaw Mining Company, is that under that Act they have a grant irrevocable and perpetual of the right to mine phosphate rock
21 in the bed of Coosaw River. The position of the State is that the terms of the Act of 1876 grants no such right.

FIRST PROPOSITION.

That the Acts of 1870 and of 1876 are to be construed in pari materia, and under such construction the utmost interest vested in the Coosaw Mining Company was the exclusive right of mining for twenty-one years from March, 1870.

By the Act of 1870 a right to mine in the beds of the navigable streams within the jurisdiction of the State of South
22 Carolina for twenty-one years was given to certain persons named in the Act, and their associates. The grantees were required annually, on the first of October, to pay one dollar on each and every ton dug, mined and removed from the beds of the said streams, and also annually, on the first of October, or oftener if required by the State Auditor, to make returns of the number of tons by them so dug, mined and removed.

Certain of the persons named in this Act of 1870 formed the Coosaw Mining Company, an unincorporated joint stock company or copartnership, certain others of the grantees named in the Act of 1870 formed the Marine and River
23 Phosphate Mining and Manufacturing Company. Both the Coosaw Mining Company and the Marine and River Phos-

phate Mining and Manufacturing Company then began and continued to mine under the authority of this Act.

On 6th March, 1872, (*Statutes at Large of S. C., Vol. 15, page 104*) an Act was passed providing for an Inspector of Phosphates, and requiring all companies and individuals mining phosphates in the beds of the navigable streams to make their returns for royalty at certain periods, &c., &c.

On 9th March, 1871, the State passed another Act, (*Statutes at Large, Vol. 14, p. 688,*) giving to parties different from those in the Act of 1870, the same right of mining for phosphate deposits in the beds of all its navigable streams that it had before given to the persons named in the Act of 1870, but for the period of thirty years. And again, on 29th January, 1874, the State passed another Act, (*Statutes at Large, Vol. 15, p. 530,*) granting to the persons therein named, (different from those named in the preceding two Acts,) the same right of mining for phosphate deposits in the beds of navigable streams for the period of thirty years. And still later, on 3d March, 1876, (*Statutes at Large, Vol. 16, p. 95,*) the State passed another Act, granting to certain persons therein named different from any before, the right to mine phosphate deposits in Coosaw River for thirty years. 24 25

All these grantees were mining under their respective franchises, and the provisions of the Act of 1872, when the Act of March, 1876 was passed.

The Act of 1876 itself cannot be read intelligently without referring to the Act of 1870 and other similar Acts prior to 1876.

The preamble recites that the Coosaw Mining Company and other companies are engaged in mining. How and by what right? It is absolutely necessary for the Court to examine the other Acts to see under what authority of law they are so engaged in mining. The Act recites that differences have arisen between the Coosaw Mining Company and the Comptroller General as to the times and manner of paying the royalty. The Court is of necessity compelled to refer to the Act of 1870 to see what that royalty was and how it was to be paid. 26

Suppose that the Coosaw Mining Company was a corporation, would not the Court have to refer to the Act incorporating it to ascertain for what period of life it was to exercise the right granted? In the case of the other companies, corporations, referred to by the Act of 1876, the original charters of incorporation must prescribe their duration. The words, "*so long as, and no longer than*," cannot 27

be taken as repealing the clause in the original charter prescribing the term of the company's life and endowing the artificial entity with a perpetual and unending existence.

But if the Court is bound to look back for the period of one franchise, why not of another? The right to mine is a franchise just as much as the right of corporate existence, and if the right to mine in the one case would be limited by the term of its corporate franchise, why not in the other by the term of its mining franchise?

28 Unless it be that the Act of 1876 is to receive two diverse constructions. One in the case of the other corporations that the words, "so long as" did not operate to give them a right to mine longer than the period given in the original Acts incorporating them with the right to mine, and the other in the case of the Coosaw Mining Company that those words did so operate.

The rule is so well settled that Acts *in pari materia* must be construed together, that it may seem strange to cite authority in support of the rule, but as it might seem a
29 dereliction of duty not to do so, the following authorities are submitted out of many which might be called to the attention of the Court:

The two Acts must unquestionably be construed *in pari materia.*

"All consistent Statutes which can stand together, though enacted "at different dates, relating to the same subject, and hence, briefly "called Statutes *in pari materia* are treated prospectively, and con- "strued together as though they constituted one Act. This is true, "whether the Acts relating to the same subject were passed at differ- "ent dates, separated by long or short intervals, at the same session, "or on the same day."

30 *Sutherland Statutory Construction*, Sec, 283.

"The correct rule of interpretation is, that if divers statutes relate "to the same thing, they ought all to be taken into consideration in "construing any one of them, and it is an established rule of law, "that all Acts *in pari materia* are to be taken together, as if they were "one law."

United States vs. Freeman, 3 How. 564.

"Where enactments separately made are read *in paria materia*, "they are treated as having formed in the mind of the enacting "body, parts of a connected whole, though considered by such body "at different moments of time, and under distinct and separate
31 "aspects of the common subject. Such a principle is in harmony "with the actual practice of legislative bodies, and is essential to

"give unity to the laws, and a consistent embodiment in a connected "system."

State vs. Williams, 13 S. C. 558,

Patterson vs. Winn, 11 Wheat., 380.
U. S. vs. Walker, 22 How., 229,
U. S. vs. Babbitt, 1 Black, 55.
U. S. vs. Tynen, 11 Wall., 92,
Harrington vs. U. S., 11 Wall., 356.
Ryan vs. Carter, 93 U. S., 78, 32
Cooper Mnfg. Co. vs. Ferguson, 113 U. S., 727.

"Statutes on the same subject are to be taken together and construed *in pari materia*, even though there be no reference by the latter Statute to the former."

State vs. Fields, 2 Bail. (So. Ca.,) 554,

See also Lawson's Rights, Remedies and Practice, Sec. 3778, and authorities cited.

SECOND PROPOSITION. 33

That the Act of 1876 itself, in connection with the other legislation and facts before the General Assembly show that the intention of the Legislature was, by the Act of 1876, to grant not a perpetual, but an exclusive right to mine for a limited period.

1.

The terms of the Act of 1876 itself show this.

The title contemplates no grant. It is as follows:

"An Act to settle definitely the periods at which returns shall be 34
"made of phosphate rocks and phosphatic deposits dug and mined in "the beds of the navigable streams and waters of the State of South "Carolina and the royalty shall be paid thereon, and also to fix the "terms on which this Act may be accepted by the parties named "therein."

The preamble of the Act is to the same effect. It is as follows:

"Whereas, differences have arisen between the Coosaw Mining Com-"pany and the Comptroller-General as to the times and manner in "which the said Company shall make their returns of the number of "tons of phosphate rocks and phosphatic deposits dug, mined and "removed by them from the beds of the navigable streams and waters "of the State, and also as to the times when the royalty thereon shall 35
"be paid; therefore, for remedy thereof."

The title and preamble of the Act are guides to its construction. Irrespective entirely of the question of the Constitutionality of an Act whose intent is not expressed in the title or which embraces more than the one subject which is expressed in the title—and assuming, for the purpose of the argument, that the Act of 1876 is constitutional in those respects, yet the title and preamble of the Act are guides or keys to its construction.

36 "The preamble to an Act is sometimes called the key to the interpre-
"tation and notwithstanding some *dicta* to the contrary the title itself
"may be called in to aid in a doubtful interpretation."

State vs. Stephenson, 2 Bailey, (S. C.,) 334.
Sutherland on Statutory Construction, sect. 210, 211, 213.

The titles to every other Act in which a "*grant*" to mine phosphate rock is intended to be given, so expressly states, viz :

"An Act to *grant* to certain persons therein named, and their associ-
37 "ates, the right to dig and mine in the beds of the navigable streams
"and waters of the State of South Carolina, for phosphate rocks and
"phosphatic deposits."

Act of 1st March, 1870, (14 Statutes S. C., p. 381.)

"An Act to charter the South Carolina Phosphate and Phosphatic
"River Mining Company in the State of South Carolina and to *grant*
"to the persons therein named and their associates, the right to dig
"and mine in the beds of the navigable streams and waters of the State
"of South Carolina for phosphate rocks and phosphatic deposits."

Act of 9th March, 1871. (14 Statute S. C., p. 688.)

"An Act to charter the Boatmen's Phosphate River Mining Company
"in the State of South Carolina, and to *grant* to the persons named there-
38 "in and their associates, the right to dig and mine in the beds of the
"navigable streams and waters of the State of South Carolina for phos-
"phate rocks and phosphatic deposits."

Act of 29 January, 1874. (15 Statutes S. C., p. 530.)

"An Act to charter the Ladies' Island and Coosaw River Mining
"Company in the State of South Carolina and to *grant* to the persons
"named therein and their associates the right to dig and mine in the
"bed of the Coosaw River in Beaufort County for phosphate rocks and
"phosphatic deposits."

Act of March 3, 1876. (16 Statutes S. C., p. 95.)

So far therefore as any inference can be drawn from the
39 wording of the preamble and title of the Act of 1876 and of similiar acts in *pari materia* there can be no doubt but that

it was never intended to give an extended and perpetual *grant*.

2.

The circumstances and facts surrounding the enactment.

The Legislative interpretation of the license given by the Act of 1870 was clearly that it was not exclusive.

This we have shown by the number of Legislative Acts granting the same rights to others. Nevertheless the grantees 40
under the Act of 1870, (the Marine and River Company and the Coosaw Mining Company) claimed that the right was exclusive. This claim was put to the test of judicial construction. One of the grantees under the Act of 1870, instituted proceedings in the United States Circuit for South Carolina, against a grantee under a subsequent statute, to restrain such subsequent grantees from mining, on the ground that the license contained in the Act of 1870 was exclusive. The case is reported in 1 Hughes Reports, p. 72, *Bradley vs. S. C. Phosphate Co.*

The Court then decided that the right granted by the Act of 1870, was not exclusive. This was the Circuit Court and 41
an appeal could of course have been taken.

In addition to this controverted question there was the dispute between the Coosaw Mining Company and the State as to the rock on which royalty was to be paid; the opinion of the counsel of the Coosaw Company on which point was laid before the legislature.

We have therefore, in 1876, presented before the Legislature the fact that it had granted to a very large number of persons for fixed periods an equal concurrent right of mining in the beds of the navigable streams, and that there were disputes not as to the *duration* but the *exclusive* character of 42
its grants, and to the rock on which royalty was to be paid.

Is it not, therefore, reasonable, and only reasonable, that the Legislature in 1876, with no question as to duration bebefore them, simply intended to parcel out the area and avoid disputes by restricting the parties enjoying such rights to defined territory free from the interference of others? And would it not be in the highest degree unreasonable to suppose that the Legislature intended, without any conceivable motive, to convert a license limited in its duration to a perpetual and irrevocable one. And this too by covert and ambiguous language slipped in, and at variance with the general object of the Act as expressed in the title? Every preceding 43
Act on the subject expressly stated in the title, that the Act

was for the purpose of granting the right. It does seem preposterous to suppose that the Legislature, whenever it granted the smaller estate, was careful to state that it intended so to do, but when it granted the larger, thought such statement unnecessary.

3.

The policy of the State as evidenced by similar enactments.

44

The public policy of all the States has become to limit the life of corporations so as to prevent such artificial creations from having perpetual existence beyond the control and supervision of the public. The Coosaw Mining Company are now attempting to effect, through an unincorported association, what the natural limits of life forbid to individuals and public rules of law forbid to corporations.

The State in no instance, prior or subsequent to 1876, has granted the right to mine save for a limited period.

45 It passed prior to 1876 four Acts giving the right of mining, but all for limited periods from twenty-one to thirty years.

It passed in 1878 a general Act, giving the right to mine to some fifteen different companies for the period of ten years.

In no instance has it ever granted the right beyond a period expressly limited in the Act. We are now asked to construe the Act of 1876 as a novel and singular departure of the State from its policy. A departure couched in doubtful and uncertain language.

46 It scarcely needs argument to show that the words "so long as," "and no longer than" are not such terms as would ordinarily have been used. Any one drawing a grant intended to be perpetual, and drawing it in pursuance of an agreement and settlement reached without any desire to conceal some covert purpose, would have expressed it clearly as in fee simple or in perpetuity, and would have added as a proviso, a clause that the grant was upon the condition that the Coosaw Mining Company should at all times make the required returns and pay the royalty, etc., etc.

That the policy of a State may be looked to as a guide in the construction of a statute, has been acted on by this Court

47 in the late case of *United States vs. Missouri, K. & T. Ry.*, decided 19th October, 1891. (12, Sup., Court Reporter p. 13.)

The Statutes being *in pari materia*, and to be so construed what is their meaning as taken together? Is it not viewing them as a connected whole, that the right—not exclusive—to mine for twenty one years, given by the Act of 1870, is, by the Act of 1876, simply changed to an exclusive right without any extension of the period?

Under no other theory can a plain and harmonious construction be given to the two Statutes.

Therefore we conclude that the Acts of 1870 and 1876 being construed *in pari materia* and to be made to harmonize as one connected whole, that the right made exclusive by the Act of 1876, must, for its duration, be referred to the original charter of 1870, and expired therefore, at the end of the term of twenty-one years, given by the Act of 1870, to wit: on 1st March, 1891. 48

There is certainly no express extension of the period of twenty-one years, for which the license to dig was given. It is only claimed inferentially from the words in the third section, that upon accepting the Act, the Coosaw Company shall have "the exclusive right to occupy and dig, mine and re- 49
"move phosphate rock and phosphatic deposits from all that "part of the said Coosaw River above mentioned, so long as, "and no longer than they shall make true and faithful returns "of the number of tons thereof they shall so dig, mine and "remove and ship, or otherwise send to market, and punctu- "ally pay the royalty thereon."

The claim depends, therefore, upon the inference that a right for a period defined to be for "so long as" the grantee shall perform certain acts, the grantee was already bound to perform, shall convert a grant expressly given for a limited period into a grant for perpetuity.

50

THIRD PROPOSITION.

That it is a canon of construction in cases of grants similar to the present one that nothing passes but what is expressed in clear and unequivocal terms, and every doubt must be resolved in favor of the State.

In grants between individuals, the language is taken most strongly against the grantor. In grants from a State, the rule is exactly the opposite, the language is to be taken most strongly against the grantee.

"The words of a private grant are taken most strongly against the 51
"grantor, though, if the meaning cannot be discovered, the instru-

"ment is void. But this rule is reversed in cases of public grants. "They are construed strictly in favor of the government on the "grounds of public policy. * * * any ambiguity in the terms "must operate in favor of the government. Whatever is not une- "quivocally granted, is taken to be withheld. Whether the grant "be of property, franchises, or privileges, it is construed strictly in "favor of the public; nothing passes but what is granted in clear "and explicit terms."

Sutherland Stat. Const. Sect. 378.

52 Such is the unquestioned rule in the United States Supreme Court.

"It is also a familiar rule of construction, that where a Statute "operates as a grant of public property to an individual, or the relin- "quishment of a public interest, and there is a doubt as to the "meaning of its terms, or as to its general purpose, that construction "should be adopted which will support the claim of the government "rather than that of the individual. Nothing can be inferred against "the State. * * * * The rule is a wise one, it serves to "defeat any purpose concealed by the skillful use of terms to accom- "plish something not apparent on the face of the Act, and thus "sanctions only open dealing with Legislative bodies."

Slidell vs. Grandjean, 111 U. S., 437.

53

"But if there be any doubt as to the proper construction of this "Statute, (and we think there is none), then that construction must "be adopted which is most advantageous to the interests of the gov- "ernment. The Statute being a grant of a privilege must be con- "strued most strongly in favor of the grantor."

Hannibal R. R. Co. vs. Packet Co., 125 U. S., 271.
Citing: *Gildart vs. Gladstone*, 12 East. 668–675.
Charles River Bridge vs. Warren Bridge, 11 Pet., 420, 544.
Dubuque, &c., vs. Litchfield, 23 How. 66.
The Binghampton Bridge, 3 Wall. 51-75.
54 *Rice vs. R. R. Co.*, 1 Black, 358-380.
Leavenworth, etc., R. R. vs. U. S., 92 U. S. 733.
Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

"This Act contains the grant of certain privileges by the public to "a private corporation, and in a matter where the public interest is "concerned; and the rule of construction in all such cases is now "fully established to be this, that any ambiguity in the terms of the "contract, must operate against the corporation and in favor of the "public; and the corporation can claim nothing but what is clearly "given by the Act."

Richmond R. R. Co. vs. Louisa R. R. Co. 13 How. 81.

55 "Whenever privileges are granted to a corporation, and the grant "comes under revision in the Courts, such privileges are to be

"strictly construed against the corporation and in favor of the pub-
"lic, and that nothing passes but what is granted in clear and
"explicit terms. Whatever is not unequivocally granted in such
"Acts is taken to have been withheld."

Holyoke Co. vs. Lyman, 15 Wall., 512.

"The rule of construction in this class of cases is, that it shall be
"most strongly against the corporation. Every reasonable doubt
"is to be resolved adversely. Nothing is to be taken as conceded
"but what is given in unmistakable words, or by an implication
"equally clear. The affirmative must be shown. Silence is nega- 56
"tion, and doubt is fatal to the claim."

Fertilizing Co. vs. Hyde Park, 97 U. S., 666.

"These principles have been steadily recognized in the construc-
"tion of land grants made by the Federal Government in aid of
"railroads and other like enterprises."

Sutherland Stat. Const, Sec. 379.
Leavenworth etc., R. R. vs. U. S., 92 U. S., 733.
Rice vs. P. R., 1 Black, 358.
Slidell vs. Grandjean, 111 U. S., 412.
Dubuque vs. Litchfield, 23 How., 66.

57

It has been expressly decided to be the rule of construction in this State as to the beds of navigable streams containing phosphate deposits.

State of South Carolina vs. Pacific Guano Company.
22 S. C. Reports, pages 83 and 86.

In this last case, the Supreme Court, in considering the very question of a grant of phosphate rock in the bed of a navigable stream, say:

"In all grants from the Government to the subject the terms of
"the grant are to be taken most strongly against the grantee and in 58
"favor of the grantor, reversing the rule as between individuals *
" * "But this rule applies *a fortiori* to a case where such grant
"by a Government to individual proprietors is claimed to be not
"merely a conveyance of title to land, but also a portion of that
"public domain which the government held in a fiduciary relation
"for general and public use."

State of South Carolina vs. Pacific Guano Co., 22 S. C., 50, 83, 86.

Such being the unquestioned rule of law, with the application of it to the present case in the words of the Court in Slidell vs. Grandjean, 111 U. S., 438, there "is an end of the
"defendant's case, and their extravagant pretensions are 59
"dissipated."

The answer of the appellants, the Coosaw Mining Company, to this mass of reason and authority, may be stated as follows;

1. That the Act of 1876 constituted a *contract* upon sufficient consideration made by the State, and is not subject to the rule of construction construing the same strictly in favor of the State.

60 2. That the Act of 1876 is not ambiguous, and that the 21 years limitation, imposed by the Act of 1870 is repealed by the general repealing clause of the Act of 1876.

3. That the Legislative interpretation has been in this view.

There is a class of cases where a State has entered into a contract, such as a negotiable bond for money, or a contract to erect a public building, or for services to be performed by an individual or officer, where the Courts have said the contract must receive the same construction as a similar con-
61 tract between individuals,

Such are the following cases relied on by the appellant:

Davis vs. Gray, 16 Wall, 232.
Murray vs. Charleston, 96 U. S., 445.
Hall vs. Wisconsin, 103 U. S, 10.
Tennessee vs. Whitworth, 117 U. S.. 137.
Louisville Co. vs. Citizens Co., 115 U. S., 697.

But this class of cases is wholly distinct from, and the rule therein has no application to cases involving a sale or grant of the public domain.

62 The distinction is clear. In the one class *i. e.* the class relied on by appellant, the State contracts with the individual for the creation of something that does not already exist or for the acquisition of services to be rendered in the future. In the other class—the class before the Court—the State is induced to part with something it already has of value—its domains and property, and the temptation is always for the individual to attempt to acquire this at less than its value.

The question as to who drew or penned the Act of 1870, or the Act of 1876 is perfectly immaterial. The claim of the State is, that it has been established as a *"canon of con-*
63 *struction,"* that where the grant of public rights, franchises or property is in question, the grant is to be construed

strictly in favor of the State and against the grantee. The reason of the rule is, because of the shifting and heterogenous character and composition of the *personnel* of Legislative bodies who act in a fiduciary capacity, and their presumed inability in dealing with the property disposed of by them as trustees for the public, to contend against the stimulus of private greed and gain inherent in individuals applying for remunerative grants and concessions. In other words, the weight of the lobby is apt to be too great for the capacity of the Legislative hall. 64

The present case vindicates the reasonableness of and the necessity for the rule. Here it would appear that almost all the phosphate Acts have been penned or prepared by private interested parties. A mere inspection of the Coosaw Act of 1876 shows that it must have been prepared by skillful lawyers to effect a purpose.

In the struggle between the practiced and unpracticed mind, the clever, astute brain of the counsel for a wealthy corporation and the inert and unsuspicious mind of the member of the Legislature, the public welfare would surely be sacrificed save for the interposition of just such a rule of construction as requires that the terms of the grant must be clear, explicit and void of all ambiguity, showing its intent on its face, and to enforce such a result that all doubts must be resolved in favor of the public. 65

The case of the Pacific Guano Company decided by the Supreme Court of South Carolina, was a much stronger appeal to the equitable relaxation of the rule than the present one.

The Pacific Guano Company had been in possession through themselves and their grantors of the beds of the stream claimed by them and had purchased upon the faith and in the belief of their title.

In that case the State was represented by Messrs. Smythe & Lee the present counsel for the Coosaw Mining Company, and in their briefs of argument before that Court they strongly pressed on the Court the argument that the grant must be construed strongly, and every presumption made in favor of the State and against the grantees, and the Supreme Court adopted and enforced the rule as set out in their arguments. 66

It appears from the testimony, that the Act of 1876, was drawn by Mr. James B. Campbell, the Counsel for the Coosaw Mining Company and one of the associates, under the Act of 1870, to whom the right to mine in the bed of the Coosaw River was given. (*Printed Record, page 77*) The appellants object to this testimony, but it is competent. 67

The appellants in their answer, seek to escape from the effect of the rule of construction, that such grants must be construed strictly in favor of the State, by charging that the Act was drawn by the State and proposed to them as a contract, to be considered and entered into. (*Printed Record, page 42*). The evidence shows that such was not the case, and is competent as disproving the allegation of fact in the answer. Further, the context of the Act shows the same. Legislation is asked to settle the question upon what
68 rock royalty should be paid—rock mined from the bed of the river, or rock mined and shipped away to market. The Act as passed, contemplates legislation on, and the settlement of, this question; but there is slipped in, in the body of the Act, a preamble and clause claimed to effect something else. Evidently, we submit, this interpolation must have proceeded from the parties to be benefited thereby.

That the appellants themselves are conscious that the appearance of the Act of 1876 is to the effect that the second preamble in Section 2, on which they rely to establish a contract for consideration was interpolated in a
69 manner to avoid attention, "slipped in," as it were, appears from their action in this cause. On page 12 of the printed Record, the Court will find the Act of 1876 printed as an exhibit—(Exhibit "A,") of appellants. On page 12, the preamble in Section 2, is written by appellants, as if it were separated from the main body of the Section, in a way to show that it was distinctly brought to the Legislature's attention, and treated as a separate part of the Act. The fact is that this Act as presented to the Legislature and printed in the official volume of Statutes—(vol. 16, page 381) contains this preamble incorporated in the second section as as a part of that section in a way to avoid attention, and escape being treated as constituting a separate and effective part of
70 the Act. A correct copy of the Act, the Court will find at the foot of this argument.

This Act, however, is not a contract. It lacks the two essential elements of a binding contract—*mutuality* and a *consideration*.

FOURTH PROPOSITION.

That the right given to the Coosaw Mining Company was only a license to dig in the nature of an executory contract without consideration or mutuality, and therefore binding on neither side. That except as to rock already mined etther the
71 *State or the Coosaw Mining Company could, at any time, disregard the Act.*

The right given by the Act of 1870 is a mere license to dig, carrying no property or interest in the phosphatic deposits until actually mined. The words of the Act are:

"Give and grant to the following persons * * * *
"the right to dig, mine and remove, for the full term of twenty-one
"years, from the beds of the navigable streams and waters within
"the jurisdiction of the State of South Carolina, the phosphate rocks
"and phosphatic deposits."

It is further provided in Section 2 that the grantees shall 72
pay one dollar on each and every ton mined, and further, the
"sum of five hundred dollars as a license fee."

They are given the right to dig; the rock becomes the property of the grantee only when dug.

The first Court before which the question came was the Circuit Court of the United States for the District of South Carolina in 1875 in the case of *Bradley vs. So Ca. Phos. Co.*, 1 Hughes, 75.

The Court held that it was not a contract, but a mere license, and that the licensees under the Act were not compelled to dig or mine. This has been by the Supreme Court of the State expressly decided to be a mere license. 73

In 1878, the State passed an Act, (approved 22 March, 1878, 16 Statutes S. C., p. 615), whereby it granted to the Oak Point Company the exclusive right to dig and mine phosphate deposits from the beds of certain navigable streams, in the same language as theretofore used in the license to the Coosaw Mining Company under the Acts of 1870 and 1876.

In the case of the *State vs. The Pacific Guano Co*, 22 S. C. 50, the State Supreme Court construed the meaning of the words in the Act of 1878, providing that the Oak Point Company "shall have the exclusive right to dig, mine and remove "phosphate rock and phosphatic deposits from the beds of "Bull River and North and South Wimbee Creeks." 74

The Court say, page 86:

"The Act contains no words of grant of the soil nor of anything
"that implies it. The right to dig, mine and remove phosphate
"rocks and phosphatic deposits, &c., simply confers an authority, a
"privilege, or franchise, like the permission to exclude the tide from
"the Roxbury Flats for the purpose of a mill power * * * *
"The Act conferred upon the Oak Point Mine Company *simply a li-*
"*cense* to dig phosphates, and did not convey the title to the soil
"which remained in the State."

This being the matter of the construction of a State Statute and of the meaning of phraseology of local property-law, the decision of the Supreme Court of the State, is conclusive 75
and binding, as well on the Federal as the State Courts.

The same rule, however, is the general law. It is a license. The Supreme Court of this State, in *State vs. Pacific Guano Co.*, having decided it as the property law of this State, that words such as are in the Act of 1870 and 1876, carry only *a mere license to dig*, it does not matter that the words are expressed in an Act any more than if they were expressed in a deed or any written instrument.

"A mere license is revocable. * * It may further be
76 "observed that a license under seal (provided it be a mere license,)
"is as revocable as a license by parol."

Baron Alderson in *Wood vs. Leadbetter.*
13 *Meeson & Welsh. Excheq. Rep., 837.*

To give a right to the possession there must be a grant of some interest in, or easement upon the land.

"An easement always implies an interest in the land in or over
"which it is to be enjoyed. A license carries no such interest." *
"Whatever right one has in another's land by license, may, as a
"general proposition. be revocable at will by the owner of the land."

77 *Washburne on Easements, p. 6.*

"License as a term of real estate law, is an authority to do a par-
"ticular act or series of acts upon another's land, without possessing
"any estate therein."

Am. and Eng. Encyclopedia of Law, vol. 13, p. 539.

"A license is, technically, an authority given to do some one act
"or a series of acts on the lands of another without passing any
"estate in the land."

Cook vs. Stearn, 11 Mass. 533.

78 A right to mine and remove minerals is sometimes, but incorrectly called a mining *lease.* But the distinction is plain.

"A lease is a contract for the possession and profits of the land for
"a specified period, with the recompense of rent; it is the grant of
"an interest in the land. But a license to mine is a mere incorpo-
"real hereditament."

Am. and Eng. Encyclopedia of Law, vol. 15, p. 594.

Mr. Pomeroy, in his work on Constitutional Law, p. 358, says:

79 "The word 'license' is one familiar in the common law nomencla-
"ture. It there means a personal permission given by the owner of

"lands to an individual, for that person to do some act or series of "acts upon the licenser's land, which acts, but for the permission, "would have been trespasses. Such licenses may be oral or written. "In either case the common law declares a simple license, even "though money had been paid for, to be revocable at the will of the "licenser." (Citing Wood vs. Leadbetter, 13 M. & W., 838.)

Tillotson vs. Preston, 7 Johns. 285.

"Permission to cut timber, imposing restriction, held to be a mere revocable license, and the licensee liable in trespass for all the timber cut by him after revocation, and that it lay with the licensee to 80
show any propositions which would make such license a contract."

1 *Wash. Real Prop., Sect. 398.*

"4. But it is proposed in this chapter to treat only of the subject "of licenses. These are of two kinds: one called executory, where "the Act licensed to be done is yet to be performed; the other where "it has been done. The distinction is an important one, as bearing "upon the right of the licenser to revoke the license."

"5. So long as it is executory, it may be revoked at the pleasure of "the licenser, for, from its very nature, it is essentially different from "a grant in respect to carrying with it the means of being enforced "by legal or equitable process."

81

In the present case, by the Acts of 1870 and 1876, the Coosaw Mining Company are given the right to go upon the State's domain, *i. e.* the bed of the Coosaw River, (which, under repeated decisions of the United States Supreme Court, is as much the State's domain as any portion of her territory,) and there dig, and therefrom remove phosphate rock and phosphatic deposits, paying for this privilege not *rent*, but as styled in the Act of 1876, a *royalty* of one dollar on every ton dug and removed. That is, they are permitted to do one or more of a series of acts upon the State's land, paying therefor according to the acts done. The right is permissive only—the Coosaw Company is not 82
bound to take possession, nor to mine, nor to remove any rock, nor to do any one or more of the series of acts permitted. They are granted leave, and pay only if they avail themselves of the permission. The thing is wholly executory; whenever the Coosaw Company mine a ton they pay for it, —not before—and no interest or estate passes to them until they have mined and paid for it.

The right given under the Acts being, therefore, a mere license to mine, wholly executory in its character; was it a contract so binding upon either side as to give a right to insist on its execution, or was it lacking in that element 83
essential to all such executory contracts, i. e. *mutuality?*

The position of the defendants, the Coosaw Mining Company, before the Court, is that they are entitled to require from the State the specific performance of the contract claimed under the Act of 1876. That is, that the State is bound to permit the Coosaw Mining Company to go on and mine its phosphate territory in Coosaw River, in perpetuity. A mere glance at the Act shows that the Coosaw Company is claiming a right for itself, that it denies to the State. Whilst claiming that it has a right to compel the State to
84 allow it to proceed, it denies that the State has the reciprocal right to compel it to proceed. The Act gives no such right. Under the Act the Coosaw Company might mine one or one hundred thousand tons in a year, it might employ the most insufficient or the most expensive plant for its operation without the State being able to interfere. It might mine no rock at all. The Act only requires it to pay one dollar per ton royalty on such rock as it does mine, without any corresponding obligation to mine any at all. Is such a contract binding upon the State?

85 "A contract founded upon mutual promises between persons of "full age must be obligatory upon both parties, so that each may "have an action upon it or neither will be bound." * * * "The "mutuality of obligation is the very essence of all contracts founded "upon mutual promise."

Addison on Contracts, Vol. 1, p. 14.

The Coosaw Company is demanding of the State performance of what it claims are the State's obligations under the Act of 1876. Can it do so under a contract so lacking in mutuality? Wholly unilateral in its nature?

86 "The requisites of mutuality taken in its most general sense, in- "clude both a mutuality of legal right and a mutuality in the equi- "table remedy. * That is, the contract must be of such a nature "that both a right arises from its terms in favor of either party "against the other while the corresponding obligation rests upon "each towards the other; and also that either party is entitled to "the equitable remedy of a specific execution of such obligation "against the other contracting party."

Pomeroy on Contracts, Sections 162–163.

87 "A party not bound by the agreement itself has no right to call "upon the Court to enforce the performance against the other con- "tracting party by expressing his willingness in his bill to perform "his part of the agreement, and a specific performance will

" not be decreed where there is no mutuality of remedy and obliga-
" tion."

Ducie vs. Ford, 19 Pac. Rep. 417.

" To entitle a party to specific performance the rule is, that there
" must be mutuality both as to the obligation and the remedy."

Duff vs. Hopkins, 33 Fed. Rep., 608.

88

" Another reason why specific performance should not be decreed
" in this case is found in the want of mutuality."

Marble Co. ve. Ripley, 10 Wall., 359.

The fact that the Coosaw Company has actually dug and mined phosphate rock for a time, does not supply the want of mutuality any more than in an instance where one of the parties not bound had partly executed the contract.

Thomas vs. Railroad, 101 U. S., 86, the Court, through Mr. Justice Miller, says :

89

" But what is sought in the case before us is the enforcement of the
" unexecuted part of this agreement. So far as it has been executed,
" namely, the four or five years of action under it, the accounts have
" been adjusted, and each party has received what he was entitled
" to by its terms. There remains unperformed the covenant to arbi-
" trate with regard to the value of the contract It is the damage provi-
" ded for in that clause of the contract that are sued on in this action.
" Damages for a material part of the contract never performed;
" damages for the value of a contract which was void, It is not a
" case of a contract fully executed. The very nature of the suit is
" to recover damages for its non-performance. As to this it is not
" an executed contract "

3 Pomeroy Eq. Jur., § 1405.

90

The contract must be, in general, mutual in its obligation and remedy.

Norris vs. Fox. 45 Fed. Rep., 407.

" The rule is fundameutal, that a contract will not be specifically
" enforced unless it is obligatory on both parties, nor unless both
" parties at the time it is executed have the right to resort to equity
" for its specific performance. Marble Co. vs. Ripley, 10 Wall., 340;
" Bodine vs. Glading, 21 P. A. St., 50; Duvall vs. Myers, 2 Md. Ch.,
" 401; German vs. Machin, 6 Paige, 288; Boucher vs. Vanbuskirk,
" 2 A. K. Marsh, 345; Duff vs. Hopkins, 33 Fed. Rep., 599-607. And
" where a contract is not specifically enforceable against one of the
" parties, he cannot, by subsequent performance of those conditions
" that could not be specifically enforced, put himself in a position to 91
" demand specific performance against the other party." Hope vs.

Hope, 8 De. Gex., M & G., 731-6; Fry Spec. Perf. (3rd Ed. Am. Notes,) § 443.

Cabeen vs. Gorden, 1 Hill, Ch. (S. C.,) 56, 57.

"A contract to be sustained and specifically enforced as a bar to "the plaintiff's equity, must be fair, just, reasonable, mutual and "founded on a good or valuable consideration."

One promise may be a good consideration for another pro-
92 mise, but not as is said in 1 Parson's Conts., 448:

"Unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement."

"An agreement to bind must be mutual."

Fripp vs. Fripp, Rice Eq., S. C., 109.

Bean vs. Burbank, 16 Me., 458.

A contract in writing to convey lands at a fixed price and within a stated time, where the other party did not himself take, and noth-
93 ing was paid or agreed to be paid by him, was held void.

Mers vs. Franklin, 68 Mo., 127.

Where the purchaser at an execution sale, gave the defendant a written promise to re-convey upon the payment of a specified sum by a day named, but the defendant did not bind himself to make such payment, the promise was held without consideration.

Houston vs. Mitchell, 38 Texas, 85,

It was held that a written agreement under which one party was to deliver to the other prairie hay not to exceed two hundred tons,
94 payment to be made on delivery of designated instalments, did not confer upon the latter party a right to enforce delivery to the limit mentioned, was therefore, without complete mutuality, and left it optional with each party to avoid the agreement on giving notice to the other, at any period during the time of delivery.

Knight vs. The Indiana Coal and Iron Company, 47 Ind, 105; S. C. 17 Am. Rep., 692.

A granted to B the right to enter upon his land and to mine and remove coal and other minerals therefrom "during the continuance of this agreement," and to erect all needful buildings for that purpose, paying to A a certain price per ton for the minerals taken; and it was agreed that B should have the right to cease mining and re-
95 move his building at any time. *Held*, that B took an estate at will, determinable at the will of either party.

In this case it is said that it does not remove the difficulty to consider the agreement to amount only to a license, that the same result would follow.

Salt Co. vs. East Saginaw. 13 Wall., 377.

"There is no obligation on any person to comply with the conditions of the law. It is a matter purely voluntary; and as it is "purely voluntary on the one part, so it is purely voluntary on the "other part; that is, on the part of the legislature, to continue or not "continue the law. The law in question says to all: You shall have "a bounty of 10 cents. per bushel for all salt manufactured, and the 96
"property used shall be free from taxes. But it does not say how "long this shall continue; nor do the parties who enter upon the "business, promise how long they will continue the manufacture. "It is an arrangement determinable at the will of either of the parties, as much so as the hiring of a laboring man by the day."

Welch vs. Cook, 97 U. S., 542.

"It does not create a contract in the sense that it cannot be "repealed. * * This is a bounty law, which is good so long "as it remains unrepealed, but there is no pledge that it shall not be "repealed at any time. Salt Co. vs. East Saginaw, 13 Wall., 373.

"Conceding as the plaintiff must and does, that the exemption of 97
"his property was of the bounty of the legislature, he knew when "he accepted it that it was liable to be revoked whenever either the "local legislature or congress should be of the opinion that the public "interests demanded such action."

State of Illinois vs. Illinois Central R. R. Co., 33 Fed. Rep., 771.

"It is a fundamental rule in equity that a contract to be specifically enforced must in general be mutual in its obligation and in "its remedy, and it must be *mutual ab initio*."

Shenandoah vs. Dunlop, 10 S. E. Rep. 240. 98
(Court of Appeals of Virginia.)

"There was no mutuality of obligation nor any other consideration "for the agreement of the defendant. The plaintiff did not by this "instrument obligate himself to do anything, and therefore the "other party was not bound."

Stensgaard vs. Smith, 44 Northwestern Rep. 669.
(Supreme Court of Minnesota.)

It is plain, therefore, that these defendants, the Coosaw Mining Company, have under the Act of 1870 and 1876 no contract with the State that they are entitled to enforce. 99
No contract whereby they are entitled to require that the

State be compelled in the future to permit them to carry on their operations of mining and removing phosphate rock from the bed of the Coosaw River Their claim is that on the faith of the right given, they have invested large amounts of plant which constitute a consideration for the contract which binds the State to its performance.

The answer is plain. They were not bound to invest anything. What they did was of their own free will and accord, and for their own purposes, and as we show later, with full
100 notice that they were investing at their peril. They certainly are entitled to no specific execution of the contract by so doing, nor even to any action of damages or compensation for any alleged breach of the contract.

In *Burton vs. Great Northern Ry. Co.* 25 Eng. Law and Eq. Rep. 478, an agreement in writing had been made between the plaintiff and the defendant by which the plaintiff undertook.

"In consideration of the terms hereinafter mentioned to provide
' all wagons, etc., necessary for the cartage of gravel, merchandise,
' etc., between Hatfield and Ware, and to convey all grain, etc., that
"may be presented to him for that purpose," for five shillings per
ton. "And it is mutually agreed that this agreement shall continue
101 "in force for the period of twelve months."

The plaintiff in pursuance of the agreement invested in wagons, horses, etc., prepared to do the business and performed it for about six months, when the defendant railway company arbitrarily ended the arrangement and refused to allow the plaintiff to do any further transportation. The plaintift sued for damages Held by the Court of the Exchequer Chamber, that the contract was not binding for want of mutuality and either party could terminate it.

And the express point was decided by the Supreme Court of South Carolina in the case of *Holmes vs. Caldwell*, 8 Rich.
102 247.

There an agreement had been entered into by a commercial house in Charleston with a drayman, by which they agreed to pay him a certain price for all their drayage done by him. The drayman invested in a large amount to do the business when the firm suddenly stopped business; some of the copartners entering into business under a different firm name and employing a different drayman.

The drayman sued the old firm for damages. The Court say:

"As mutuality is an essential element in all contracts, suppose
"Meetze should have abandoned the defendant's service, shortly after
103 "he had embarked in it, could the defendants have maintained an ac-
"tion against him for a breach of his contract?" * * But it was

"argued that upon the faith of the defendant's agreement the plain-
"tiff was induced to make a large investment in horses and drays to
"enable him to fulfill his contract, and that in consequence of its unex-
"pected termination, he has been subjected to a heavy loss, for which
"defendants should be held responsible. The obvious answer to the
"argument is this. That the plaintiff should have guarded against
"such a contingency before he adopted the contract."

The claim is made that the Act was not void for want of mutuality because mutuality existed in the forfeiture by the Coosaw Company of its franchise if it failed to make the returns and pay the royalty. 104

This, however, does not constitute *mutuality*. There must be reciprocal obligation. The Coosaw Company might prefer to abandon its franchise to going on working.

Could the State refuse to allow the Coosaw Company to abandon its franchise, and compel the Company to carry on its work? Clearly not. Now we have the Coosaw Company claiming the right to compel the State to allow it to mine without any corresponding power in the State to compel the company to mine whether or no it desires to forfeit the franchise or not. As an illustration of the necessity for this mutuality.

The State might have many advantageous offers made to it to purchase the right to mine. These offers it could not accept because of the Coosaw Company's position. Should, however, from the discovery of fresh phosphate deposits elsewhere, or other reasons, the Coosaw Company determine it could, advantageously to itself, abandon the mining in the State's territory, and do so, then the State will have lost the advantageous offers made to it, and also the Coosaw royalty, as it has no power to compel that company to remain and go on mining. In the same case cited before of the *State vs. Pacific Guano Co*,, it was argued by the counsel in behalf of the State, that the right to mine given to the Oak Point Mines Company under the language of a Statute similar to that in the Coosaw Act, was a mere tenancy at will void of mutuality, that either party could terminate at any time. The Supreme Court of South Carolina so decided, and their decision is equally conclusive of the present case. 105 106

The claim that it was a contract for consideration is as unsupportable as the claim that it was in terms a grant in perpetuity.

Where was the consideration for any such absolute-perpetual valuable grant as is claimed under the Act of 1876? It is admitted that there was no such grant under the Act of 107

1870. The consideration to be paid for the rock was wholly executory and prospective. One dollar for each ton of rock thereafter to be mined. The claim that a consideration passed is rested by the defendant, the Coosaw Mining Company, upon several grounds:

First. That they agreed to make monthly returns in lieu of annual.

A more flimsy statement of consideration could not be
108 well imagined. By the Act of 1870, they were required to make returns as often as required by the State Auditor. The State, under that Act could have required the Coosaw Mining Company to make daily returns if it saw fit.

By the Act of 1872 the company was required to make monthly returns and as appears by Mr. Edward McCrady, Sr.'s opinion in 1875, the Company was in 1875, actually making monthly returns under this Act without question, whereas by the Act of 1876 the State's power was abridged, and it could only require monthly returns; therefore, on this point the concession was *from* not *to* the State, and such consideration as proceeded from that concession passed *to* not *from* the
109 Coosaw Mining Company.

Second. The settlement of a difference between the State and the Company as to whether the royalty should be paid upon rock dug, mined and removed, or upon rock shipped and sent to market. Whatever ground there may have existed for the Comptroller General's contention on this point, by the Act of 1876, that is expressly fixed against the Comptroller General's, and in favor of the Coosaw Company's position. By the Act of 1876, it was expressly enacted that royalty shall be paid only upon every ton of rock "*dug*, "*mined and removed and shipped or otherwise sent to market.*"
110 So that on this point the concession was *from* not *to* the State, and by the Act of 1876 the Coosaw Mining Company *received* not *gave* consideration.

Third. That the Coosaw Company agreed to pay royalty quarterly in lieu of annually, thus benefiting the State by giving it its royalty in instalments every three months in lieu of in a lump once a year.

What this practically amounted to was simply the loss of interest on the money so paid—nothing more. That the Coosaw Mining Company did not consider this as forming a consideration of much moment appears by the opinion of Mr.
111 Edward McCrady, Sr., in 1875, (*Printed Record, page 64, folio 96*), where speaking of the demand of the Comptroller

General to be paid royalty on rock mined one year before it would be paid if upon rock shipped he says:—

"The only difference to the grantees besides the inconvenience of "having to raise this amount before they have received it is the "interest from this time to first of October, 1876."

But he goes on to say that the question made by the Comptroller General involves very grave and serious consequences to the Coosaw Mining Company. If they were compelled to pay royalty on every ton of rock mined or removed from the bed of the river they would be compelled to pay royalty on a mass of deposit they could not afterwards sell *i. e.*,—He says in his opinion that a marketable or saleable ton of phosphate rock must contain at least 55 per cent. of phosphate of lime. Much of this rock mined by the Coosaw Company contained less than this percentage and was therefore unsaleable. Therefore if the Company paid royalty on the rock simply mined they would pay on this unsaleable material whereas if this royalty was paid on the rock sold or shipped to market the Company would be paying only on such rock as they could utilize; which was, in his opinion, equitable. 112 113

The matter of the loss of a little interest did not at that time enter in the minds of the Coosaw Company.

The serious question pressing on them was that they should be compelled to pay royalty on unmarketable rock, and this clause as we have seen the State abandoned by the Act of 1876.

Sec. 3 of the Act of 1876 provides. That before commencing operations, the grantees shall give a bond to pay this royalty annually on the first day of October. The bond required before allowing them to proceed at all, was to secure payment on 1st October, but there is nothing in the Act to prohibit the State from requiring payments thereafter more often. And if there were, is such a consideration to be considered? It will be noticed there is no increase of royalty. The State is to receive the same one dollar per ton as before, but that payment is to be partially anticipated, payment thereafter to be made quarterly instead of annually. But for this the Coosaw Mining Company got from the State an *exclusive right* to mine in territory in which they had before only a *concurrent* right with many others Not content with that the Company claims this exclusive right *in perpetuity*. A grant vastly greater than the one enjoyed before for an anticipation in payment of a few months. 114 115

Is it possible that so great a franchise can be supposed to pass for so slight a consideration?

"There must have been a deliberate intention clearly manifested "on the part of the State to grant what is claimed. Such a purpose "cannot be inferred from equivocal language. * * * * "It must not be a mere gratuity. There must be a *sufficient considera-* "*tion* or no matter how long the alleged right has been enjoyed, it "may be resumed by the State at its pleasure * * * * No "grant can be raised by mere inference or presumption, and the "right granted must be clearly defined."

116

Newton vs. Commissioners, 100 U. S. 561.

"But the contract must be shown to exist. There is no presump- "tion in its favor Every reasonable doubt should be resolved "against it. Where it exists it is to be rigidly scrutinized and never "permitted to extend *either in scope or duration* beyond what the "terms of the concession require."

Tucker vs. Ferguson, 22 Wall 527-575.

Fourth. That the company changed the nature of the grant under the Act of 1870 and under this Act of 1876, accepted
117 a grant on condition, forfeitable for failure to pay the royalty and make the returns and further agreed to curtail the right they possessed under the Act of 1870, to mine in all the navigable streams of the State and limit themselves to the bed of the Coosaw River. But by the very terms of the Act of 1870 the right given is declared expressly to be *on condition* of the punctual payment of royalty and a grant or estate on condition is always forfeited upon breach of the condition. Therefore, there was no change in the character of the interest or the right they held. Furthermore, the State Supreme Court held, as we have seen in the case of *the State vs. Pacific Guano Company*, that it was a mere tenancy at will.
118 And by the agreement between the Coosaw Mining Company and the other grantees under the Act of 1870, whereby the former acquired the right to mine inthe bed of the Coosaw river, they were expressly restricted to that locality. Further, if they had any more extended rights of mining in the other navigable streams they certainly never parted with them under the Act of 1876. That Act gives them the exclusive right to mine in the bed of the Coosaw River, but deprives them of and requires them to abandon no right whatever of mining elsewhere.

Fifth. That on the faith of the contract and perpetual right
119 given the Coosaw Mining Company by the Act of 1876, they have made large additional expenditures for plant and addi-

tional appliances, the cost of which constitute a valuable consideration, and which will be left useless on their hands if their perpetual right to mine is not sustained. The only evidence of this is the answer of the appellants. But this cannot constitute a consideration. A little more than one year after the passage of the Act of 1876, viz: in 1877, they were distinctly notified that the State denied the existence of any such perpetual contract. Attorney General Conner in his written opinion to the Legislature, adopted and acted upon by that body, distinctly notified the Coosaw Company, that in the view 120
of the Legislature, the right to mine given them, terminated in March, 1891, and continued no longer. If after this distinct notification, *fourteen years* before the expiration of the franchise, the Coosaw Mining Company, notwithstanding, chose to ignore the notice, and treat the license as perpetual, who is to blame? Not the State.

It is not the case of one standing by quietly and seeing another place plant and betterments on land to which he has a claim, without notification, so as to seize them thereafter.

There is no such equity. Scarcely had the Act of 1876 been passed; scarcely had the Coosaw Mining Company promulgated the theory of a perpetual irrevocable grant—before 121
they have had time to materially increase their plant—14 years before the termination of their admitted license—does the State in unmistakable manner, notify them that no such claim to a perpetual grant will be conceded, but that in 1891, at the expiration of the 21 years, given by the Act of 1870, the right of the State will be enforced, and the possession of the territory required. If, in the face of this solemn and explicit notice and warning, the Coosaw Mining Company, notwithstanding, chose, at their own risk and peril, to make these additional expenditures, (assuming they did make them,) the risk and the loss is their own.

122

Attention should, however, be called to the fact, that no such risk or loss is involved. No permanent plant has been erected, no expenditures made on territory that belongs to the State. The territory in which the license to mine was given is a submerged estuary several feet under water at the lowest tides. The mining, (so-called), is performed by floating dredges, which scoop up the deposits from the bed of the territory beneath the water.

All the mills, structures, washers, &c., enumerated in the answer, are built on land the property of the Coosaw Company themselves—*i. e*:

They purchased a tract of land called Chisolm's Island, 123
on which everything of this kind was erected. The State

does not, cannot claim or acquire a particle of all this. The floating dredges can be carried and used elsewhere without difficulty.

The fact is, the Coosaw Company loses nothing in the way of plant or property, and are invited by the State, under the terms of the Act of December, 1891, to continue their mining.

The Coosaw Mining Company assert that this is simply an attempt on the part of other companies to turn them
124 out, and that if the decree be against them they will be left with a large plant on their hands that they cannot use. The reverse of this is the truth. Not only is it not sought to turn the Coosaw Mining Company out, but it is sought to keep them in. All they have to do under the terms of the Act of 1890 is to apply for and take out licenses under the same terms and regulations as the other miners, and they can go on and utilize their plant in mining in the territory just as heretofore, and just as the other miners will do. They will be mining and utilizing their plant, but without any advantage over other miners, and paying the State such royalty as it may be entitled to require, not
125 circumscribed by the limit of $1.00 per ton.

The great question involved, is the State's right to impose a royalty of over $1.00 per ton in its entire phosphate territory.

The Coosaw Mining Company claims a perpetual grant from the State, not only of the exclusive right to mine all the phosphate rock in the Coosaw River, but of the right to mine it at a royalty not exceeding $1.00 per ton. As the Coosaw Mining Company and the other Companies mining in the State's territory under licenses, are competitors in the market, it is manifest that if the Coosaw Mining Company possesses any advantage over its competitors in
126 the rate of royalty, it can undersell them in the market and practically drive them out of operation.

Therefore, the State cannot charge any of its other licencees a higher rate of royalty than the Coosaw Mining Company pays, and if the Coosaw Mining Company cannot be made to pay over $1.00 per ton, no other licensee can, practically, be made to pay more.

The State will, therefore, be circumscribed and limited to $1.00 per ton, as the utmost it can ever receive from its phosphate deposits, whether within or without the bed of the Coosaw River.

The State, by the Act of 1890, has sought to raise the royalty to $2.00 per ton. The Coosaw Mining Company
127 deny the right of the State to compel them to pay more than $1.00.

The clear cut issue involved is, then, not whether the State shall allow one miner to mine in Coosaw River in preference to another, but whether the State shall now receive $2.00 instead of $1.00 per ton for its phosphate rock, and whether it shall be forever held and bound to $1.00 as the rate of royalty on all its phosphate deposits irrespective of what their intrinsic value may be.

The Coosaw Mining Company claim that the decisions as to the construction of Acts *in pari materia*—the elucida- 128
tion of an Act by recourse to its title and the circumstances surrounding its passage, and the construction of a legislative grant most strongly in favor of the State, apply only where there is ambiguity in the Act—and that there is no ambiguity in the Act of 1876. Concede ambiguity say they and the rule is against them, but there is no ambiguity.

As to ambiguity; the State desires simply to point to the framework and context itself of the Act of 1876; to the fact that the Attorney General of the State one year after its passage, read it in a sense diametrically opposite to the reading of the Coosaw Mining Company; that the Coosaw Mining Company found it necessary to apply to its Counsel 129
for a construction of the Act; to the concurring opinion of the two distinguished Judges in the Court below, and to the size and learning of the briefs of argument filed in this Court, on behalf of the Coosaw Mining Company to show that the Act is at least ambiguous.

Again, it is asserted by the Coosaw Mining Company that the effect of the language and the general repealing clause of the Act of 1876 was to repeal the twenty-one years limitation in the Act of 1870 and to substitute a new and perpetual franchise.

Intimately connected with this proposition is the ques- 130
tion of repeal by implication, for in construing these Acts together the matter to be determined is how far the later Act affects or repeals the former.

Before taking up this phase of the case, it is necessary to determine the effect of the last clause of the Act of 1876, which is in these words:

"SEC. 5. That all Acts and parts of Acts inconsistent with this Act be, and they are hereby, for the purposes of this Act, repealed."

Do these words operate so as to make the Act of 1876 repeal in express terms the Act of 1870, or any of its pro- visions? It is submitted that they do not add any force to the Act of 1876 as a repealing Statute, but rather, if they 131
have any effect at all they expressly limit the repealing ef-

fect of that Act. The authorities upon which this position is based are conclusive, and based on sound reason. Repeals by implication are not favored, and there must be a positive repugnancy between the different provisions of the Acts in controversy. The repugnancy must be such that no reconciliation by some reasonable construction can be effected. If the different provisions can be made to harmonize at all without doing violence to the intention, such a construction as will effect this end must be given. The view desired to
132 be presented has been so fully expressed in the authorities upon which reliance is placed, that full extracts have been made from them.

Henderson's Tobacco, 11 Wall., 656:

It is contended, on behalf of the United States, that the proviso relied upon by the complainants was repealed by the Act of July 20, 1868.

If this is so, it was repealed by implication only. That Act contains no words expressly repealing either the Act of 1867 or that of 1864, to which the one of 1867 was a supplement. On the contrary, the repealing clause which it does not contain, indicates plainly the intention of Congress to leave in force some portions of former Acts relative to the same subject matter. The 105th Section enacts, "that all Acts and parts of Acts inconsistent with the provisions of this
133 are hereby repealed." This is an express limitation of the extent to which it was intended former Acts should cease to be operative namely, only so far as they are inconsistent with the new Act. It is quite impossible to engraft upon this express declaration of legislative intent an implication of more extensive repeal. Statutes are, indeed, sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter Acts are repugnant to those of the former as far as they are repugnant. The enactment of provisions inconsistent with those previously enacted, manifests a clear intent to abolish the old law. In the United States vs. Tynen, 11 Wall., 92, it was said by Mr. Justice Field, that "when there are two Acts upon the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter Act without any repealing clause operates to the extent of the repug-
134 nancy as a repeal of the first; and even where two Acts are not, in express terms, repugnant, yet if the latter Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act." For this several authorities were cited, some of which have been cited in the present argument. This is undoubtedly a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute, is impliedly repealed, or *so far* as the provisions of the subsequent statute are repugnant to it, *or so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several Acts are such as may well subsist together, an implication of repeal cannot be allowed.

Citing *Dwarris on Statutes, 674, et seq.*

Wood vs. U. S., 16 Pet., 362, Mr. Justice Story says:

135 "The question then arises whether the sixty-sixth section of the Act of 1799 (Ch. 128,) has been repealed, or whether it remains in full

force. That it has not been expessly or by direct terms repealed is admitted ; and the question resolves itself into the more narrow inquiry, whether it has been repealed by *necessary* implication. We say by *necessary* implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old ; and even then the old law is repealed only *pro tanto* to the extent of the repugnancy."

Chicago, etc., R. R. Co. vs. U. S., 127 U. S., 406 :

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Where there are two Acts upon the same subject, effect is to be given to both if practicable.

Murphy ads. Fabbri, vs. U. S., 196:

Authorities to show that there must be a positive repugnancy between the provisions of the new law and the old, to work a repeal of the old law by implication, and that even then the old law is only repealed to the extent of the repugnancy, are very numerous and decisive. Wood vs. U. S , 16 Peters, 342.

Endlich on Interpretation of Statutes, § *210.*

But repeals by implication are not favored. It is a reasonable 137
presumption that the Legislature did not intend to keep really contradictory enactments in the Statute Book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. (See cases cited in note.) Hence it is a rule founded in reason as well as in abundant authority, that in order to give an Act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it. the effect of repealing it, the implication of an intention to repeal must necessarily, from the language used, disclosing a repugnancy between its provisions and those of the earlier law. be so positive as to be irreconcilable by any any fair, strict or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same t/me, the force of the earlier law, and construing 138
both together in harmony with the whole course of legislation upon the subject. (See cases cited.)

And it may be here stated that the same rule applies equally to questions arising between different parts and sections of the same enactment.

The law is thus laid down succinctly by Judge Inglis, in the case of *State vs. Alexander*, 14 Rich. Law Rep., 251 :

" But it is insisted for the defendant that the former Act was impliedly repealed by the latter. The law does not favor repeal by implications, nor is it to be allowed unless the repugnancy be quite plain. It has ever been confined to repealing as little as possible of the preceding statute. Altogether two Acts are seemingly repugnant, yet they 139
shall, if possible, have such construction that the latter may not be a

repeal of the former by implication. (Dr. Foster's case, 11 Coke, 63; Bacon's Argument, Statute D.) A later Statute on a given subject, not repealing an earlier one in terms, is not to be taken as a repeal by implication unless it is plainly repugnant to the former or unless it fully embraces the whole subject matter. Goddard vs. Boston, 20 Pick., 407. ACTS IN PARI MATERIA are to be taken together as one law, and are to be so construed that every provision in them may, if possible, stand. Courts should, therefore, be scrupulous how they give sanction to supposed repeals by implication. (Haynes vs. Jacks, 2 Pick., 176.) In order to a repeal of a former statute by implication from the terms of a latter, the matter of the latter must be so clearly repugnant to, that it necessarily implies a negation of the former. (Vide 1 Clack Com.,
140 p. 89.) From these authorities (and they might be indefinitely multiplied) it results, that a repeal is not to be implied without necessity existing in the terms of the two Statutes; that such necessity consists in a repugnance between the two Statutes that is susceptible of no reasonable reconcilement, and that if the two canstand together and have room for operation without conflict and in consistency, they shall do so."

State vs. Young, 30 S, C., 409.

Was the Act of 1807 repealed by implication? It is quite certain that it was not. Such repeals sometimes take place when A SUBSEQUENT ACT COVERS EXHAUSTIVELY THE WHOLE GROUND of one prior in time, but does not expressly repeal it. The law may, and does, imply from this substitution a repeal of the former Act. Such repeals, however, are not favored in the law. Mr. Dwarris, page 154, says:
141 "Every affirmative statute is a repeal of a precedent affirmative statute where its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory and contrary to the former Act in the very matter," and the repugnancy such that the two Acts cannot be reconciled, for then LEGES POSTERIORES PRIORIS CONTRARIAS ARROGANT. The leaning of the Courts is so strong against repealing the provisions of a former statute by construction, as almost to establish the doctrine of "no repeal by implication."

Phalen vs. Virginia, 8 How, 169.

On 30th January, 1829, the Legislature of Virginia passed an Act authorizing certain Commissioners to conduct a lottery to raise money to improve a road and to pay over same to the Turnpike Company, to be applied to that purpose. Two of
142 the Commissioners declined to act, and nothing was done until 25th February, 1834, when an Act was passed, in substance, forbidding lotteries after January 1, 1840. On March 11, 1834, an Act was passed filling the places of the two Commissioners who had declined "to carry into effect the Act of 30th January, 1829." Nothing was done until 19th December, 1839, when the Commissioners made contracts with defendant, who was convicted under the Act of February, 1834. The Supreme Court of the United States, in deciding the case, says:

"There is also another view of this case, which concludes the plaintiff
143 in error from the benefit of a defense under this clause of the Constitution, even if it were tenable. The Act of 1829 had become obsolete by non-user. Without further legislation, the license granted by

it could not be exercised. The plaintiff in error cannot claim a right to sell lottery tickets without invoking the aid of the Act of 11th March, 1834, passed a few days after the 'Act suppressing lotteries.' The Courts of Virginia have very properly decided that 'the dormant right to draw the lottery, which was revived by the Act of March, 1834, must be taken as subordinate to, and limited by, the Act of the 25th of the previous month; that those statutes must be taken *in pari materia*, and receive the same construction as if embodied in the one Act; that there is nothing repugnant in the provisions of the one to those of the other, when the first is taken as limiting the time within which the right under the second is to be exercised. This construction of their statutes by the Courts of Virginia is not only just and correct, but is conclusive on this Court and on the case, as it estops the plaintiff in error from 144
averring against the constitutionality of the limitation under which he claims his privilege."

Finally it is argued for appellants that there has been a legislative or State acquiescence in the construction that the Coosaw Mining Company was entitled under the Act of 1876 to a perpetual right to mine.

How can the State be presumed to have acquiesced in any such construction?

The Act of 1876 was passed in March, 1876. In the summer of 1877 the Legislature referred it to Gen. James Conner, then Attorney-General, to report upon the phosphate properties and industry of the State. In November, 1877, 145
Gen. Conner made his report in which he reported that the Coosaw Company had an irrevocable license for twenty-one years from March, 1870. That he understood that they claimed that the Act of 1876 gave a perpetual license but such claim was unwarranted by the terms of the Act. Thereupon the Legislature in March, 1878, passed another Act (Statutes of South Carolina, Vol. 16, p. 615.) entitled "An "Act to protect the rights and interests of the State in the "phosphate rocks and phosphatic deposits in the navigable "streams and waters of the State."

It is this Act that the appellants rely upon as containing a legislative acknowledgment or admission of their perpetual 146
grant. In Section 12 this Act grants to the Farmer's Phosphate Company the right to mine for ten years in the bed of Coosaw River, excepting all that part of Coosaw River theretofore exclusively granted to the Coosaw Mining Company. But this very Act of 1878 quoted on appellants brief as containing an express recognition of the Act of 1876 as granting to the Coosaw Mining Company exclusive mining rights in Coosaw River also contains (Sec. 27, p. 623) the provision that;

"Nothing herein contained shall be construed in any way to confirm any rights alleged or claimed to have been granted"

No presumption can possibly arise of acquiescence because 147
the State was not called upon to do anything until the expiration of the term of twenty-one years, viz: March, 1891.

Under the view of Attorney-General Conner the State was not called upon to act as the Coosaw grant did not expire until 1891 and the State allowed the company to remain and work out the rest of the period.

FIFTH PROPOSITION.

That no such right or interest ever passed to the Coosaw Mining Company as gave to them the right to the possession or control of the bed of Coosaw River, or to the specific deposits therein.

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In other words, assuming that the Coosaw Company did have a contract as claimed by them, does that contract or right to mine give them any right to specific property and to retain possession of the State's territory in case of a breach of contract by the State?

Assuming there has been a breach, or a threatened breach, by the State, what is the remedy of the Coosaw Company? Can it set up the contract affirmatively, as it does by way of defence, and claim a specific performance, retaining possession of the property to be mined in the future? We submit not. That if the State has broken the contract, the Coosaw Company has against the State as it would have against an individual a claim for damages for the breach, but it has not the right to maintain the possession of specific property to which no title has ever passed to it.

149

It does not follow as a necessary incident to a contract, that a right to the land which is the subject of the contract should be implied. There may be a contract obligation carrying the consequences of a breach, but nothing more. The Supreme Court of this State, in *State vs. Pacific Guano Co.*, have decided it as the property law of this State that words such as are in the Act of 1870 and 1876, carry only *a mere* license to dig.

150

> "The Act contains no words of grant of the soil, nor of anything "that implies it. The right "to dig, mine and remove phosphate "rocks and phosphatic deposits," &c., simply confers an authority, a "privilege, or franchise, like the permission to exclude the tide from "the Roxbury Flats for the purpose of a mill power."

This case has been since affirmed by the Supreme Court of South Carolina, in two cases, viz:

State vs. Pinckney, 22 S. C., 484.
Port Royal Mining Company vs. Hagood, 30 S. C., 523

151

The same view was early taken by the United States Circuit Court for South Carolina.

In the case of *Bradley vs. So. Ca. Phos. Co.*, 1 Hughes, 72, that Court decided that,

"The grant of the right to dig for and remove the phosphate rock, "in a particular place is the grant of an incorporeal right, it does not "convey a corporeal hereditament or any right in the soil itself."

The well known rule of law in all such cases, is, that for a breach of that right the remedy is by an action at law for the damages. No right to possession follows the license, nor any right to specific performance. 152

That the remedy of an action against the State affords less result than against an individual, inasmuch as a State can not be sued does not affect the question. He who makes a contract with a sovereign State does so with a full knowledge of the immunities and the exemptions that surround it. This country is filled with contracts of the most solemn character, first made by statute and then covenanted under the great seal of the State. But the Supreme Court of the United States has repeatedly held that the holders of such contracts when they took them knew with whom they were dealing, and must stand to the legitimate consequences. That the State immunity from prosecution entered into and was part 153 and parcel of the contract. So here we say, that if as between individuals, the breach of the contract would give to the Coosaw Mining Company only an action for damages against the individual covenantor—then it can have no greater or ther rights because the State is the covenantor. The fact that such covenantor could not be held to answer on the covenant was in the minds of and assented to by the Coosaw Mining Company when they took the agreement.

SIXTH PROPOSITION.

That so much of the Act of 1876 as is claimed to grant to the 154 *Coosaw Mining Company, a perpetual right to mine in Coosaw River is invalid under the Constitution of the State of South Carolina.*

So much of Section 3 of the Act of 1876, under which the Coosaw Mining Company claims the perpetual grant, is unconstitutional.

The title of that Act is, "*An Act to settle definitely the period at which returns shall be made of phosphate rock and phosphatic deposits, dug and mined in the beds of the navigable streams and waters of the State of South Carolina, and the royalty shall be paid thereon, and also to fix the terms on which* 155 *this Act may be accepted by the parties named herein.*

The Constitution of the State provides in Sec. 20 of Art 2. "Every Act or Resolution having the force of law *shall re-*
"*late to but one subject, and that shall be expressed in the title.*"

Tested by this provision, the Act is unconstitutional and should be so declared. In the consideration of this proposition, it will be interesting to examine into the reasons for this constitutional provision. The reasons and occasion for the general adoption of this and similar provisions in our
156 State constitutions have been variously expressed. In New Jersey, the constitution itself states the purpose thus: "To avoid improper influences which may result from intermixing in one and the same Act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

Judge Cooley in his work on Constitutional Limitations, thus summarizes the conclusions of the Courts.

"It may, therefore be assumed as *settled* that the purpose of these provisions was: *First*, to prevent *hodge podge* or "log rolling" legislation; *Second*, to prevent surprise or fraud upon the Legislature, by
157 means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked, and carelessly and unintentionally adopted; and *Thirdly*, to fairly apprise the people, through such publication of legislation proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have an opportunity of being heard thereon, by petition or otherwise, if they shall so desire."

In a Pennsylvania Case, *Dorsey's Appeal*, 22 P. F. Smith, 192, the following summary, differing somewhat from that of Judge Cooley, is given:

"The purpose of the amendment is to prevent a number of differ-
158 ent and disconnected subjects from being gathered into one Act, and thus to prevent unwise or injurious legislation by a combination of interests. Another purpose was to give information to the members or others interested, *by the title of the bill*, of the contemplated legislation; and thereby prevent the passage of unknown and alien subjects which might be *coiled up in the folds of the bill*. The amendment was found necessary to correct the *evils of unwise, improvident and corrupt legislation*, and therefore is to receive an interpretation that will effectuate its true purpose."

Such being the design of the constitutional provision, what is its meaning?

The provision is mandatory and must be so regarded by the Court, else the wise purpose involved in it would not be
159 accomplished.

Judge Cooley says, at page 179:

"In all that we have said upon this subject, we have assumed the constitutional provision to be mandatory. Such has been the view of the Courts almost without exception."

An Act can relate to but *one subject*. This has been construed to mean one general subject, or, as it is expressed in one or more constitutions, "one subject and matters properly connected therewith," thus introducing the doctrine of germane provisions. The unity of the subject, however, must still remain, and all the provisions must be connected with the general subject, so as to tend legitimately to accomplish 160
the general purpose of the Act. Accordingly, it has been held, that in creating corporations of all kinds, any provisions which contribute toward enabling them to carry out the purposes for which they were created, can be inserted in the Act without violating this Constitutional mandate:

From the nature of this constitutional provision, its application must be determined by the particular provisions embraced in the Act assailed as invalid under it.

In *Rader vs. Township of Union*, 38 N. J. L., 509, it is held that the constitutional provision requires

"Substantial unity in the Statutable object." 161

In *State vs. Town of Union*, 33 N. J. L., 351, it is said:

"The unity of the object must be sought in the end which the legislative Act proposes to accomplish."

In *Conner vs. Railroad Company*, 23 S. C., 435, it is said:

"No new subject is introduced into the Act, but the subject which all the while engages the attention of the Legislature is the Railway, which necessarily includes any *appropriate means for its construction.*"

If the Act in the case last cited had contained a clause 162
authorizing the same Townships or Counties to subscribe bonds in aid of some other railroad corporation, the Act to that extent would have violated the constitution by relating to more than one subject.

Unity vs. Burrage, 103 U. S. 458.
In Binz vs. Weber, 81 Ill., 288, it is held:

That the question whether an Act contains more than one subject is to be determined by the controlling purpose of the law; not by the various provision made for carrying that purpose into effect.

This section of the constitution not only requires this unity 163
in the subject of the Act, but goes a step farther, requires that

this single subject shall *be expressed in the title of the Act.* The evils designated to be remedied very plainly indicate, that the phrase means *clearly expressed.*

It is not meant that the title of the Act should amount to an index of the contents of the Act, but it should express in general terms, sufficiently explicit to keep the title from being misleading, and from concealing the real purpose of the Act, the general comprehensive and main subject of the Act. The title, however, limits and controls the Act, and in so far as the
164 Act attempts to legislate outside of the subject of the title, to that extent the Act is unconstitutional. While, therefore, a subject may be embraced in an Act with a title covering that subject, yet with a different title, the Act may be void. The Legislature may restrict the title of an Act so that it will not express the broader subject embraced in the body of the Act. The title of an Act which only expressed one of the germane subjects in the Act considered, in Conner vs. Railroad Company, *supra*, would clearly not have expressed the subject of that Act, nor would it have done so had several of those subjects been expressed in the title without embracing the main subject, to which the others were ancillary. There
165 must be the same unity in the title of the Act that is required in the body of the Act itself. In case of a conflict between the title and the body of the Act, the Act has the force of law only to the extent of the subject expressed in the title, unless the obnoxious provisions are so interwoven with those relating to the subject in the title that they cannot be separated, and leave an intelligible law, which the Legislature clearly intended to enact.

Judge Cooley says at page 178:

166 "The principle questions in each case will, therefore be, whether the Act is in truth broader than the title; and, if so, then whether the other objects in the Act are so intimately connected with the one indicated by the title that the portion of the Act relating to them cannot be rejected, and leave a complete and sensible enactment which is capable of being executed.

As the Legislature may make the title to an Act as restrictive as they please, it is obvious that they may, sometimes, so frame it as to preclude many matters being included in the Act which might have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive.

The Courts cannot enlarge the scope of the title; they are vested with no dispensing power; the constitution made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been more
167 comprehensive, if in fact the Legislature has not seen fit to make it so."

The following authorities, showing instances in which the Courts have considered this provision, declaring Acts to be in violation thereof, and in some cases giving the reasons stated for the decisions, are deemed pertinent as showing the manner in which the subject has been dealt with.

State vs. Northampton, 14 Atl. Rep., 576, (N. J.)

"An Act authorizing the township committees in any township in this State, not containing an incorporated city or borough wholly or in part within its limits, to pave or macadamize any street or streets, road or roads, or part or parts thereof, within said township, etc." "The body of the Act applies to all townships of this State. * * But the enacting part of the Act is qualified and restrained by the title. In the title the Legislature announces its purpose to legislate, not for all the townships of this State, but only in respect to such of them as as do not contain an incorporated city or borough, either wholly or in part, within the limits of the township. The constitutional mandate that the object of every law shall be expressed in its title, has given the title of an Act a two-fold effect It has added additional force to the title, as an indication of legislative intent in aid of the construction of a statute couched in language of doubtful import, and it also operates in a constitutional limitation upon the enacting part of the law. The enacting part of a statute, however clearly expressed, can have no effect beyond the object expressed in the title. To maintain any part of such a statute, those portions not embraced within the purview of the title must be exscinded; and, if the superaddition to the declared object cannot be separated and rejected, the entire Act must fail." 168 169

Leach vs. People, 12 N. W. Rep., 728,

"An Act to change the time of electing certain officers in a county therein named."

The main object of the Act was the change of the composition of the Board of Supervisors in Wayne County to diminish the number of the members of the board as provided by the general township organization law, and to change the mode of their election from towns singly to groups of towns. This subject was not expressed in the title, nor was it any way germane to the purpose which was expressed in the title. The title was deceptive and misleading, giving no intimation of the more important purposes of the Act.. 170

Unity vs. Burrage, 103 U. S., 458.

But it is insisted that the second election ratified by the Act under consideration, not only had reference to the subscriptions of stock and the issue of bonds in aid of the Indiana and Illinois Railway Company, but also of three other railway companies and the Act, therefore contained more than one subject, and the latter subject was not expressed in the title. In such a case the provisions of the law touching the subject, which is expressed in the title, must stand. Those relating to the other subjects, not expressed in the title, alone fall. By such a construction the purpose of the constitutional provision is fully accomplished. All the provisions of the law under consideration which have reference to the Indiana and Illinois Central Railway Company constitute but one subject, this, as we have seen, is expressed in the title; the other matters constituting other subjects, not expressed in the title, are so entirely disconnected with that which is expressed, 171

that they can be eliminated and leave the remainder of the Act in full force. Packet Company vs Keokuk, 95 U. S., 80.

Hatfield vs. Commonwealth, (Pa.,) 14 Atlantic Reporter, 151.

"An Act to prohibit the issuing of licenses within two miles of the Normal School, at Mansfield, Tioga County, Pa."

"The title of the Act is notice to all the world that no licenses will be granted to sell liquors within two miles of the Normal School. The first section was strictly germane, as it merely prohibits the granting
172 of licenses within said territory. The second section made it an offence, punishable as therein provided, for any person to sell spirituous, vinous, malt or brewed liquors, for drinking purposes, within the prescribed territory. * * * * It contains two distinct subjects and only one of them is referred to in the title. * * * * The title to this Act is so palpably misleading that we are constrained to say that the second section cannot stand."

In People vs. Gadway, 61 Mich., 285.
S. C., 1 Am. St. Rep., 578.

The Court held that, in an Act to regulate the sale of liquors, a section forbiding the sale within a certain radius was unconstitutional because it was not embraced in the title.

173 *Ellis vs. Hutchinson*, 38 N. W. Rep., 14.

"It will be observed that nowhere in the title of the Act in question is it intimated that chattel mortgage contracts were considered in the proposed Act, nor that a violation of such contract was to make the offender liable to a criminal punishment; but, on the contrary, the object stated in the title is clearly to punish persons for acts committed to property under contracts of an entirely different character, and with which the lien created by a chattel mortgage cannot be classed, and has no place, and it is very evident the title to the Act does not include any such contract, and it was no part of the object expressed therein."

People vs. Danahy, 20 Mich., 34–9.

174 The title "An Act to restrict the sale of personal property in certain cases" is not sufficient to support a provision which declares the willful destruction of personal property upon which there is an unsatisfied mortgage lien, given by the person so destroying it, punishable as a misdemeanor.

Camden & A. R. Co. vs. May's Landing and E. H. C. R Co., 7 Atlan. Rep., (N. J.,) 524.

"An Act to incorporate the May's Landing & Egg Harbor City Railroad Company."

This charter manifestly embraces two distinct objects; it confers power, upon the branch road to construct a road and lease it; and attempts to enlarge the authority of all other railroads by permitting
175 them to accept a lease. There is no indication in the title that such legislation was contemplated. The constitutional restraint could not

be invoked for a more salutary purpose than to suppress a scheme to amplify corporate powers in a way which effectually conceals the intention to do so.

In the Borough of Phœnixville, 109 Pa. St., 48, it is said:—

"In determining the unity of the subject, regard must of course be had to the ultimate object to be attained. Details leading to the accomplishment of that object are cognate to the subject of legislation and therefore form a part thereof. The Act under consideration is of that character and hence does not offend against the prohibitory clause of the amendment. But unity of subject is not enough. The mandatory clause of the amendment imperatively requires that the subject of proposed legislation whatever it may be, shall be clearly expressed in the title of the bill. As the means of notice to representatives as well as their constituents the latter is quite as essential as the former. We are not called upon, however, to show the necessity or vindicate the wisdom of the constitutional requirement. It is enough for us to know that it is an express mandate of the organic law which the legislature ought to obey and Courts are bound to enforce. While it may be difficult to formulate a rule by which to determine the extent to which the title of a bill must specialize its object, it may be safely assumed that the title must not only embrace the subject of the proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially therein interested. Unless it does this it is useless. * * * It would not do to require the title to be a complete index to the contents of the bill, for this would make legislation too difficult, and bring it into constant danger of being declared void. But on the other hand the title should be so certain as not to mislead." 176 177

In Rogers vs. Manufacturer's Improvement Company 109 Pa. St., 111, it is said:—

"It may be conceded that an entire Act is not necessarily unconstitutional, because the title omits to give notice of some particular matter contained in the bill; Dawhurst vs. Alleghany, 14 Norris, 437; but a title which tends to deceive or mislead as to the subject of the bill is not sufficient; Alleghany County, Home's Appeal, 27 P. F. S., 77; Union Passenger Railway Company's Appeal, 32 P. F. S., 91. If the title omits all reference to the main subject of the bill it cannot give validity to the subject matter thus ignored. In such case the reasonable presumption is that the title was intended to conceal the purpose of the bill. The purpose of the title is to give notice of the legislation contemplated. When it imports the purpose of the bill to be one subject, while the bill itself shows a different subject to be the purpose, the title is undoubtedly misleading. In such case it would be a gross perversion to declare that the subject is clearly expressed in the title. * * * The language of the title is such as to indicate that it was not designed to clearly express the subject of the bill, but on the contrary, it was chosen to conceal the subject and purpose of the bill. It is fair to presume that the title was so framed to prevent the opposition which might, and undoubtedly would, have been made to the passage of the bill had the title reasonably expressed the subject and object thereof." 178 179

In People vs. Hills, 35 N Y., 452, Judge Davis said:

"It is not a sufficient compliance with this provision that a subject is expressed in the title of the Act. The true and actual subject or object must be there expressed, or the evil and mischief which the framers of the constitution sought to avert and prevent will not have been effectually guarded against."

Carter County vs. Sinnot, 120 U. S., 517.

A constitutional provision that a statute shall relate to one object
180 only, which shall be expressed in the title, is substantially complied with if the statute has but one general object, and that object is fairly expressed in the title.

Cutlip vs Sheriff of Calhoun County, 3 W. Va., 588.

A provision authorizing the Board of Supervisors to sell county property at Arnoldsburg, in An Act entitled "An Act locating the county seat of Calhoun County." is another and different object from that stated in the title, and in consequence unconstitutional.

Mewherter vs. Price, 11 Ind., 199.

A statute entitled "An Act Concerning Promissory Notes and Bills of Exchange," which provides "that all promissory notes, bills of exchange, *or other instruments*," etc. is void so far as it relates to "other instruments,"
181

State vs. Harrison, 11 La., An,. 722.

In Louisiana slaves and free colored persons embraced two classes which it was impossible in legal parlance to confound, and in consequence an Act entitled "An Act relative to slaves and free colored persons" violates the constitutional command that every Act shall embrace only one subject.

Dorsey's Appeal, 72 Pa. St., 192.

A provision in an Act entitled "An Act relating to the liens of mechanics, etc., upon leasehold estates." etc., which extends the liens to freehold estates, is unconstitutional, as freeholds were not expressed in the title.

182 *Brieswick vs. Mayor of Brunswick*, 51 Ga., 639.

An Act, the title of which related to the incorporation of a city, and for other purposes, cannot constitutionally contain a provision validating and confirming all the ordinances of the city heretofore passed. It was just such legislation as this which the constitution intended to prohibit when it excluded more than one subject matter from being embraced in the same law.

People vs. Parks, 58 Cal., 624.

The title "An Act to promote drainage" was held insufficient to support an Act, the paramount object of which appeared to be the storage of debris from mining and other operations.

The Act of 1876 is set out at the foot of this argument.

183 If any construction like that contended for by the Coosaw Mining Company is to be placed upon this Act, then

the main controlling purpose, object or subject of the Act would be the granting to the Coosaw Mining Company and other companies exclusive rights to dig phosphate rock in different navigable streams. Such a subject is not stated in the title. If such construction were proper the title of the Act would not embrace such subject. It would be misleading, because no one on reading the title of the Act would understand that such important legislation lies "coiled up in the folds of the bill." Indeed, construe the Act as you may, there is nothing in the title which expresses 184
the idea of any grant of any character. A deliberate attempt to conceal such an idea, or mislead, could not be more successful.

The title of the Act states three subjects. 1. Settling fixed periods for returns of rock dug. 2. Settling likewise periods for payments of royalty on rock dug. 3. Terms of acceptance of Act by certain persons named.

There is no necessary or natural connection between these subjects. There is nothing to link them together. Neither is a natural or appropriate means for the accomplishment of the other within the doctrine of cognate subjects. When we look at the body of the Act the same want of connection be- 185
tween these subjects appears. The connection which it is attempted to create between these, and the relation into which they are thrown in the body of the Act, relates to a subject of which not the remotest intimation is given in the title. The title of the Act does not even perform the poor office of an index, long as it is. The Coosaw Mining Company claims that a contract with the State for a certain exclusive right to dig the phosphate rock in a certain part of the Coosaw River to exhaustion, was created in the body of the Act. Can any intimation be found in the title that there was to be special legislation in regard to this particular subject, *i. e.*, in regard to the Coosaw Mining Company? But the body 186
of the Act, if it creates a contract with the Coosaw Mining Company, likewise creates contracts with a number of other companies of like nature, (stated in general terms,) This introduces several independent subjects, viz: a number of contracts with distinct and different companies and persons in no way connected with such other. It is admittedly incompetent for the legislature to create several distinct and separate corporations by one Act. One authority at hand is directly to the point.

In *King vs. Banks*, 61 Ga., 20:

The legislature passed an Act incorporating three corporations separate and distinct, or reviving three charters which had become obsolete. The Court held that the Act embraced more than one subject, and was therefore unconstitutional. 187

The cases already cited go to the same general effect, and sustain the proposition that the union of such independent contracts cannot be sustained, certainly not under this title, which absolutely fails to refer to such contracts, or to give any intimation of such purpose in the Act.

The opinion of Attorney-General Conner, who evidently gave this Act serious, dispassionate and impartial consideration, is submitted as entitled to great respect, and as sustaining the proposition that this Act is in violation of the consti-
188 tutional provision. He says:

"By the title and the preamble the Act is limited to the time and manner of paying royalty, and for remedying thereof the Act is enacted Had anything further been contemplated, especially anything so important as a perpetual license, it should have been expressed in the title in accordance with the constitutional provision that every Act 'shall relate to but one subject, and that shall be expressed in the title.'"

There is no indication in the title that the Legislature intended to depart from its previously settled policy of granting rights for a fixed period, or that exclusive rights as distinguished from general rights were to be granted. There is no expression of an intention to do more than
189 legislate in regard to returns and payment of royalty. Nor is there any notice of intention to confer additional rights, or to change the rights already existing, nor to confer rights upon parties who had not acquired any. The title indicate that so far as the matter of returns and payment of royalty were concerned the Act would be operative prospectively, not only in cases where rights to dig rock had already been acquired, but also in all cases where the right to dig shoul be acquired subsequently. The title and so much of th Act, therefore, are in conflict. The title does not, in th view, show the true subject of the Act.

The Legislature having restricted the operation of the
190 Act by the title, the Court cannot extend it and make it operative beyond the subject actually expressed in the title, It is the duty of the Court to so construe the constitutional provision as to fully accomplish its purpose.

It has been decided expressly that the effect of such a constitutional provision is not to invalidate the whole Act, but only so much as is not fairly included in the subject expressed in the title. Therefore, the Act of 1876 would stand, except as to so much as attempts to grant away, in perpetuity, the right of mining in the State's territory.

Allen vs. Louisiana, 103 U. S., 80.

191 And in *Unity vs. Burrage*, 103 U. S., 458. the Court say:

"The Act, therefore, contained more than one subject, and the latter "subject was not expressed in the title. In such a case the provisions

"of the law touching the subject which is expressed in the title, must "stand, those relating to the other subjects not expressed in the title "alone fall. By such a construction the purpose of the constitutional "provision is fully accomplished."

In the case now before the Court it is a reasonable construction of the Act of 1876 to say that, when considered along with the Act of 1870, the period of time within which the exclusive right claimed is limited to the twenty-one years prescribed in the Act of 1870. This is reasonable, because it is in accord with the policy of the State before 192
and since the Act of 1876 to grant rights to dig and mine only for fixed and definite periods. No instance can be shown of grants of any other character unless it should be contained in this Act of 1876.

It is in accord with a settled rule of construction applied to grants by the State which solves all doubts in favor of the State.

It is in accord with the doctrines of the Courts upon the subject of repeals by implication, and allows both Acts to stand together.

It is in accord with the absence of an expression of legislative intent in the title of the Act of 1876 to interfere 193
with the period of time during which the right to dig and [illegible] should be exercised.

[illegible]able and in accord with the settled rule that a [illegible] to hold any executory contract binding [illegible]o corresponding right or mutuality of ob- [illegible]other.

[illegible]le, because the Coosaw Company was not [illegible] did not, surrender the right to dig and mine [illegible] the Act of 1870. The Coosaw Company, [illegible]e right granted in the Act of 1876, or refused [illegible]der that, it would not have been deprived of [illegible] right to dig and mine under the Act of 1870. 194

[illegible]easonable, because it treats all the parties named or [illegible] to in the Act of 1876 fairly and alike, giving them [illegible]t of the same nature during the period limited by the [illegible]inal grants. The Act of 1876 is in the nature of a sup- [illegible]ement to the original Acts. From the nature of the cases where rights had already been granted, the settling of the periods at which returns and payment of royalty should be made, could only have relation to the unexpired term of those grants. Otherwise, why make the Act relate to the matter of returns and royalty if the real purpose was to make new grants without limitation of time, which would render the Act unconstitutional. The reasonable and nat- 195
ural way to accomplish such purpose would have been to

make the grants and require the performance of these conditions or acts as incident to the grants.

Attorney-General Connor said in his report:

> When the Coosaw Company applied for the passage of the Act of 1876, it had already established itself in the Coosaw River, and was digging and mining and making its returns and paying its royalty, and was under bonds to the State. It required no further or greater rights or license to dig and mine in that locality, and the Act of 1876 gives no such right or license. It recognizes the right of the Coosaw Company as already existing, and converts it from a right which might
196 be shared in by others into an exclusive right, enjoyable only by the Coosaw Company. It changes the QUALITY of the right and makes it exclusive "so long as and no longer than" the conditions on which the exclusive character depends] are performed, but is silent as to the QUANTITY or duration of the right. That depends upon the terms of the original grant.

This construction of the Acts of 1870 and 1876 is reasonable and in accord with historical facts and the claims made by the Coosaw Mining Company and others claiming under the Act of 1870. It gives this company what it claimed was granted by the Act of 1870, viz., an exclusive right to dig and mine for the period of twenty-one years.

197 The Court is bound to reconcile the two Acts if possi and when such a reasonable and natural solution of gnts, leged repugnancy exists it should be given e onfer rights lution is not novel, nor does it demand any itle indicate the Court. ent of royalty r-

The result of this construction leaves t prospectively, Company without any right to dig and mi already been March 1, 1891. to dig shoul

There are two assignments of error made much of the here in which call for some attention. not, in th to in

These are assignment 8 to the opinion file the Chief Justice and assignment 3 to the order of th
198 the Court. ake it

By these it is claimed as error that the Court the that an injunction could be rendered in this action, on- the complainant showed no case entitling it to invo equitable jurisdiction of the Court.

The object and effect of the agreement that the hear below should be taken as a final hearing on the merits was in order to expedite the cause and obtain the final adjudication of this Court upon the merits and thereby avoid a long, destructive and various course of litigation. Nevertheless we must assume that by these assignments the defendants propose to raise in this Court the questions that they argued
199 upon the hearing of the motion for a preliminary injunction.

That hearing by agreement was afterwards taken as a final

hearing in the cause. It was argued that no injunction should be granted on that preliminary motion because the complaint showed no case for the interposition of the remedy of a preliminary injunction; that is, that a preliminary injunction in such cases was a matter addressed to the discretion of the Chancellor who should exercise that discretion only in a case of threatened, irreparable and immediate damage.

That the bill charged no insolvency on the part of the defendants and made no case of irreparable damage or of damage that could not be fully redressed by compensation in 200
money. It was also intimated that the position was taken by the appellants that no injunction can be issued in a proceeding by information in Equity to test a title and restrain a trespass.

No demurrer has been filed to the bill. On the contrary the defendants answered fully on the merits setting up their defence and making no objection to the form of the proceeding. All such exceptions were thereby we submit waived.

These objections are applicable only to the Chancellor's exercise of his discretion upon a motion before a final hearing.

Upon final hearing where the order of injunction is based 201
upon a ascertained legal or equitable right the injunction must issue as a matter of course. Until the matter of right is decided by the final decree of the Court the Chancellor may balance relative conveniences and inconveniences, and questions of doubt, but when the right has been decided his discretion ceases, and the injunction must issue, and the method and form of proceeding by information and asking for an injunction is the proper proceeding in equity and the express remedy prescribed by the Statutes of the State.

By Section 11 of the Act of 1890 it is expressly enacted:

"SEC. 11. Should any person whomsoever interfere with, 202
" obstruct, or molest, the said Board of Phosphate Commis-
" sioners, or any one by them authorized or licensed here-
" under, in the peaceable possession and occupation for mining
" purposes of any of the marshes and navigable streams and
" waters of the State, then, and, in that case, the said Board of
" Phosphate Commissioners are hereby authorized, and in the
" name and on behalf of the State of South Carolina, to take
" such measures or proceedings as they may be advised are
" proper *to enjoin and terminate* any such molestation, inter-
" ference or obstruction, and place the State, through its
" agents, the said Board of Phosphate Commissioners, or any
" one under them authorized, in absolute and practicable pos- 203
" session and occupation of the same."

Therefore by the express Statute prescribing a remedy the Board of Commissioners are directed in the name of South Carolina to take the proper measures or proceedings to *enjoin* any interference, and it is evident without argument that you can only *enjoin* by a proceeding in equity. This present proceeding was initiated in the Courts of the State and the rules of practice governing it are the rules of practice in the Courts of the State. It was competent for the Court below upon motion of the defendants if in their opinion the com-
204 plaint filed in the State Court was not in proper shape as a bill in equity in the United States Court to order a repleader and have the bill moulded to suit the practice of that Court, but no repleader had been ordered, no demurrer or exception to the bill for form or shape has been filed, and it is too late after the hearing in the Court below now to raise an objection which was waived by the answer upon the merits.

That this is proper practice in the State Court we refer this Court to the case we have so often cited already of the *State vs. the Pacific Guano Company*, 22 S. C., page 50.

There a complaint was filed praying judgment against the defendants for damages for phosphate rock mining already
205 committed and also for an injunction to prohibit the further mining in the State's territory.

The defendants answered denying the title of the State and claiming a right in themselves to mine. The Court below issued an injunction in the case and the Court above upon this question held that the form of information was proper in such cases and an injunction could issue therein; declaring also that the nature of the action was one of those prerogatory proceedings allowed on the part of the State in which injunctions are granted.

Such also was the practice in England at Chancery. See *Daniell's Chancery Practice*, Volume 1, page 7. (Ed. of 1879.)
206

J. L. McLAURIN,
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GEO. S. MOWER,
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207

ACT OF 1870.

[General Statutes S. C., Vol. 14, p. 381.]

An Act to Grant to Certain Persons Therein Named, and their Associates, the Right to Dig and Mine in the Beds of the Navigable Streams and Waters of the State of South Carolina, for Phosphate Rocks and Phosphatic Deposits. 208

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the State of South Carolina does hereby give and grant to the following persons, to wit: George W. Williams, Chas. C. Coe, Jas. H. Taylor, Jos. R. Robertson, Edwin Platt, Wm. L. Bradley, Jas. Bridge, Jr., Wm. Birnie, and such other persons as they may associate with them, the right to dig, mine and remove, for the full term of twenty-one years, from the beds of the navigable streams and waters within the jurisdiction of the State of South Carolina, the phosphate rocks and phosphatic deposits; Pro- 209
vided, That the persons named, and their associates, shall not in any way interfere with the free navigation of the navigable streams and waters of the State, or the private rights of any citizen or citizens residing upon or owning the lands upon the banks of the said navigable rivers and waters of the State.

SEC. 2. That this gift and grant is made upon the express condition that said grantees shall pay to the State of South Carolina the sum of one dollar per ton for every ton of phosphate rock and phosphatic deposits dug, mined and removed from the said navigable rivers and waters of the State. And, further, That said grantees shall pay into the 210
Treasury of the State the sum of five hundred dollars as a license fee before commencing business under said grant.

SEC. 3. Before commencing operations under authority of this Act, said grantees, and their associates, shall file, or cause to be filed, in the office of the State Auditor a bond in the penal sum of fifty thousand dollars, conditioned that said grantees, and their associates, shall make true and faithful returns to said State Auditor, annually, on or before the first day of October, and oftener, if required by the said State Auditor, of the number of tons of phosphate rocks and phosphatic deposits dug, mined and removed by them from the beds of the navigable streams and waters of the 211
State, and shall punctually pay to the State Treasurer, an-

nually, on the first day of October, one dollar per ton for every ton of phosphate rocks and phosphatic deposits by them dug, mined and removed from the beds of the navigable streams and waters of the State during the year preceding, said bond to be renewed annually, and approved by the Attorney General. The books of said grantees and their associates, shall be opened to the inspection of the State Auditor, or agent duly appointed by him for that purpose.

212 Returned to the Senate with the objections of His Excellency the Governor, Tuesday March 1st, 1870.

IN THE SENATE, MARCH 1ST. 1870.

On the question "Shall this Act pass and become a law, the objections of His Excellency the Governor to the contrary notwithstanding," the yeas and nays were ordered (in accordance with Article 3, Section 22, of the Constitution,) the Act by *viva voce* vote, yeas, 19; nays, 5; and was ordered to be sent to the House of Representatives.

By Order:

213 (Signed) J. WOODRUFF,
Clerk of the Senate.

IN THE HOUSE OF REPRESENTATIVES, MARCH, 1ST, 1870.

On the question, "Shall this Act pass, the objections of His Excellency the Governor to the contrary notwithstanding?" the yeas and nays were ordered, (in accordance with Article 3, Section 22, of the Constitution,) the Act passed by *viva voce* vote, yeas, 77; nays, 24; and ordered to be returned to the Senate.

By Order.

(Signed) A. O. JONES,
214 Clerk of the House of Representatives.

ACT OF 1872.

(General Statutes of So. Ca., vol. 15, p. 104.)

AN ACT to Provide for the Appointment of an Inspector of Phosphates, and to Declare His Duties.

SECTION 1. *Be it enacted*, by the Senate and House of
215 Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of

the same, That the Governor be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, a competent person to the office of Inspector of Phosphates, who shall reside and have his office in the city of Charleston, and shall hold his office for two years.

SEC. 2. That it shall be the duty of all companies or individuals who are, or may be, authorized by law to dig, mine or excavate such phosphate rocks and phosphatic deposits from the beds of the navigable waters or streams within the jurisdiction of the State, to report to the In- 216
spector of Phosphates, monthly, the quantity of such rock and deposit dug, mined and excavated, and whether the same be on hand, awaiting removal, or if it has been moved, or is being moved, to furnish a copy of the bill or bills of lading, which reports shall be verified by the oath of the person making the same. And it shall be the duty of all captains of vessels and railroad officials to furnish to the Inspector of Phosphates duplicates of all bills of lading of all cargoes of such rock and deposit with which their vessels or cars may be freighted, for export from this State, or for transportation within this State. And, to the end that the said Inspector of Phosphates may be enabled to 217
verify the reports of the quantity of such rocks and deposits which have been, or may be, dug, mined, excavated and removed, he shall, at all times, have and be allowed free and uninterrupted access to all places where such rocks and deposits are dug, mined or excavated, and to all warehouses, or open or enclosed places where such rocks and deposits are stored, and to all vessels, railroad cars, or conveyances in or by which such rocks and deposits are being removed.

SEC. 3. That the said Inspector of Phosphates shall report to the Auditor of the State, monthly, the amount of phosphatic rock and phosphatic deposits which he shall as- 218
certain to have been dug, mined, excavated or removed from the navigable streams or waters of this State, by what company or persons the same was dug, mined and excavated, by what vessel or other mode of transportation the same was removed, with such other particulars as may enable the State Auditor correctly to ascertain whether the amounts due to the State therefor have been paid, and, if not, who is accountable for the same.

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219

ACT OF 1876.

[General Statutes South Carolina, Vol. 16, p. 198.]

AN ACT to Settle Definitely the Periods at which Returns shall be made of Phosphate Rocks and Phosphatic Deposits Dug and Mined in the Beds of the Navigable Streams and Waters of the State of South Carolina and the Royalty
220 shall be Paid thereon, and also to Fix the Terms on which this Act may be Accepted by the Parties named therein.

Whereas differences have arisen between the Coosaw Mining Company and the Comptroller General as to the times and manner in which the said company shall make their returns of the number of tons of phosphate rocks and phosphatic deposits dug, mined and removed by them from the beds of the navigable streams and waters of the State, and also as to the times when the royalty thereon shall be paid; therefore, for remedy thereof,

SECTION 1. *Be it enacted* by the Senate and House of Rep-
221 resentatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said Coosaw Mining Company, and all other companies and persons engaged in digging, mining and removing phosphate rocks and phosphatic deposits from the beds of the navigable streams and waters of the State shall be, and they are hereby, required, from and after the passage of this Act, to make to the Comptroller General true and faithful returns of the number of tons of phosphate rocks and phosphatic deposits they have so dug, mined and removed and shipped, or otherwise sent to market, at the end of every month; and shall punctually pay to the State Treasurer the
222 royalty already provided by law to be paid thereon at the end of every quarter or three months, the first quarter to commence to run on the first day of March in the present year.

SEC. 2. That the said Coosaw Mining Company, and all other companies and persons mentioned in the preceding Section, shall, within ten days from the passage of this Act, enter into new bonds, in the penal sums and in the manner and form already provided by law, but conforming, in their conditions, to the terms set forth in the said preceding Section, and also pay to the State Treasurer the royalty accrued up to the first day of March of the present year. And whereas it is desirable that the said Coosaw Mining Com-
223 pany, and all other companies and persons engaged in digging, mining and removing phosphate rock and phosphatic

deposits as aforesaid, shall accept the terms of this Act, in order to make it binding on them respectively; and whereas the said Coosaw Mining Company have already occupied so much of the Coosaw River as lies opposite to and south of Chisolm's Island, whereon their works are located, and to the marshes thereof, and have expended large sums of money in establishing themselves thereon with sufficient mining plant for mining and preparing for market the phosphate rocks and phosphatic deposits of that part of the said Coosaw River; therefore, in consideration thereof, 224

SEC. 3. That the said Coosaw Mining Company, on accepting the terms of this Act within ten days from the passage thereof, shall thenceforth have the exclusive right to occupy and dig, mine and remove phosphate rock and phosphatic deposits from all that part of the said Coosaw River above mentioned so long as and no longer than they shall make true and faithful returns of the number of tons thereof they shall so dig, mine and remove and ship or otherwise send to market, and punctually pay the royalty thereon, as provided in the first Section of this Act.

SEC. 4. That all other companies and persons engaged in digging, mining and removing phosphate rocks and phos- 225 phatic deposits as aforesaid under the gift and grant of the State of South Carolina, or by authority thereof, who shall accept the terms of this Act within ten days from the passage thereof, shall thenceforth have the same exclusive right where they have respectively occupied and established themselves for mining purposes, and on the same limitations as are prescribed in the preceding Section of this Act.

SEC. 5. That all Acts or parts of Acts inconsistent with this Act be, and they are hereby, for the purposes of this Act, repealed.

Approved March 28th, 1876.

226

ACT OF 1890.

(General Statutes So. Ca., vol. 20, page 691.)

An Act to Create a Board of Phosphate Commissioners, Defining its Purposes and Duties.

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met 227 and sitting in General Assembly, and by the authority of

the same, That a Board of Phosphate Commissioners be, and is hereby, created and established, which shall be constituted as follows: The Governor, the Attorney General, the Comptroller General, and two persons, citizens of the State; the last two to be appointed by the Governor, Attorney General and Comptroller General of this State, for the term of six years; the first appointment, however, to be made, one for four years, and one for six years. The Governor, Attorney General and Comptroller General shall
228 not receive any compensation for their services on this Board, except actual traveling and other necessary expenses while engaged in attending to the duties as members of this Board when the same shall be performed at any other place than the State Capital. The two Commissioners appointed as above shall receive as compensation for their services the same per diem and mileage as members of the General Assembly for the time they are actually engaged in performing the duties of their office.

SEC. 2. That the said Board shall be charged with the exclusive control and protection of the rights and interest of the State in the phosphate rocks and phosphatic deposits
229 in the navigable streams and in the marshes thereof, except that the Comptroller General shall continue to receive the reports of rock mined and dug and the royalty paid into the State Treasury.

SEC. 3. That all the powers, duties, rights and privileges vested in, and exercised by, the Department of Agriculture, as now established by law, so far as the same pertains and relates to the management and protection of the rights and interests of this State in the phosphate rocks and phosphatic deposits in the navigable streams of this State and in the marshes thereof, be, and the same are hereby, vested in, and are devolved upon, the Board of Phosphate Commissioners
230 herein created and established.

SEC. 4. That the said Board are hereby empowered and directed, if they see proper, as soon as practicable, to begin a survey of the State's phosphate territory, and for this purpose they may employ such experts and other persons, and may obtain, by purchase or otherwise, such a dredge or other apparatus as shall be found necessary to prosecute this work in a thorough manner, and the sum of ten thousand dollars is hereby appropriated to defray the expenses thereof.

SEC. 5. That the said Board shall appoint a Phosphate Inspector, whose salary shall be at the rate of fifteen hundred dollars per annum, payable monthly, and whose power
231 and duties shall be prescribed by the said Board.

SEC. 6. That the said Board shall also be empowered, if,

upon full investigation and examination, they deem it advisable, to require all persons or corporations digging or mining phosphate rock or phosphatic deposits in the navigable streams of this State, and in the marshes thereof, to pay to the State a royalty not to exceed two dollars per ton for all or any phosphate rock so dug or mined, providing six months' notice shall be given before raising royalty above one dollar.

SEC. 7. That the Governor shall be Chairman of the Board, and three members of this Board shall constitute a quorum 232
for the transaction of any business pertaining to the said Board, and the Secretary shall be appointed from among the members of said Board.

SEC. 8. That the said Board shall report annually to the General Assembly their actings and doings during the year, and to the time of the meeting of the same, with an itemized account of all their expenses for said year.

SEC. 9. That immediately after the approval of this Act it shall be the duty of the Department of Agriculture to transfer and deliver to the Board of Phosphate Commissioners herein created and established all books, papers, leases, records, or other things pertaining to the phosphate interests 233
of this State.

SEC. 10. That the said Board of Phosphate Commissioners are hereby nuthorized and directed after the first day of March, 1891, to take possession and control of the Coosaw River Phosphate territory heretofore accupied by the Coosaw Mining Company, and to issue licenses to mine therein, and remove phosphate rock and phosphate deposits therefrom, in like manner as is now provided by law for the other navigable streams and waters of the State; *Provided*, That (such parties so licensed or authorized shall be deemed the agents of the State, and) each ton of phosphate rock or phosphatic deposits, the product of such mining operations, shall be deemed the property of the State until the said 234
parties shall have paid thereon a royalty, to be fixed by said Commission, at not exceeding two dollars per ton on each ton of phosphate rock or phosphatic deposit dug, mined and removed, provided six months' notice shall be given before raising royalty above one dollar.

SEC. 11. Should any person whomsoever interfere with, obstruct, or molest, or attempt to interfere with, obstruct, or molest, the said Board of Phosphate Commissioners, or any one by them authorized or licensed hereunder, in the peaceable possession and occupation for mining purposes of any of the marshes and navigable streams and waters of the State, then, and in that case, the said Board of Phosphate 235
Commissioners are hereby authorized, and in the name and

on behalf of the State of South Carolina, to take such measures or proceedings as they may be advised are proper to enjoin and terminate any such molestation, interference or obstruction, and place the State, through its agents, the said Board of Phosphate Commissioners, or any one under them authorized, in absolute and practicable possession and occupation of the same.

236 SEC. 12. Any person or persons willfully interfering with, molesting, or obstructing, or attempting to interfere with, molest, or obstruct, the State or the said Board of Phosphate Commissioners, or any one by them authorized or licensed, in the peaceable possession and occupation of any of the said marshes and navigable streams and waters of the State, including the said Coosaw River phosphate territory, or who shall dig or mine, or attempt to dig or mine, any of the phosphate rock or phosphate deposits of this State, without a license so to do by said Board of Phosphate Commissioners, shall be punished for each offense by a fine of not less than one hundred dollars or more than five hundred dollars,
237 or imprisonment for not less than one or more than twelve months, or both, at the discretion of the Court.

SEC. 13. Should any person or persons, corporation or corporations, attempt to mine or remove phosphate rock and phosphatic deposits from any of the said marshes and navigable waters and streams, including the aforesaid Coosaw River phosphate territory, after the said first day of March, 1891, by and with any boats, vessels, marine dredges or other appliances for the same, without the leave or license of the said Board of Phosphate Commissioners thereto first had and obtained, all such boats, vessels, marine dredges and other
238 appliances, are hereby declared forfeited to and the property of the State of South Carolina, and it shall be the duty of the Attorney General, for and in behalf of the State, to institute proceedings in any Court of competent jurisdiction for the claim and delivery thereof in the ordinary form of action for claim and delivery, in which actions the title of the State shall be established by the proof of the commission by the person or persons, corporation or corporations owning the same, or their agents in posseesion of such boats, vessels, marine dredges or other appliances, of any such act of forfeiture: *Provided*, That in any such action the State shall not be called upon or required to give any bond or obligation as
239 is required by parties plaintiff in action for claim and delivery.

SEC. 14. The said Board are further authorized and empowered to inquire into and protect the interests of the State in and to any phosphate deposits or mines, whether in the navigable waters of the State or in land marshes, or other territory owned or claimed by other parties, and in the proceeds of any such mines, and to take such action for or in behalf of the State, in regard thereto, as they may find necessary or deem proper.

SEC. 15. That so much of all Acts or parts of Acts inconsistent with the provisions of this Act be, and the same is hereby, repealed.

Approved December 23rd, A. D., 1890.